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THE
NEW-YORK LEGAL OBSERVER,

CONTAINING

REPORTS OF CASES

DECIDED IN

THE COURTS OF EQUITY AND COMMON LAW,

AND

IMPORTANT DECISIONS IN THE ENGLISH COURTS;

ALSO, 11

ARTICLES ON LEGAL SUBJECTS,

PRACTICAL POINTS OF GENERAL INTEREST, REMARKABLE TRIALS,

SKETCHES OF THE BENCH AND THE BAR, ANECDOTES, ETC., ETC.

WITH

A TABLE OF CASES,

A GENERAL INDEX AND A DIGEST OF THE REPORTS.

EDITED BY

SAMUEL OWEN,

OF THE NEW-YORK BAR.

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[MONTHLY PART.

EXTRADITION OF FUGITIVE SLAVES.

In a former volume of this Journal, the writer presented his views touching the manner which Congress have prescribed, should be observed by those who seek to reclaim such persons as are held to service or labor in one State, and have escaped into another State, as seen in its Act of February 12th, 1793. In tracing that subject, it was no part of the design to call in question the power of Congress in that behalf—but only to ascertain the intent of its legislation, and the extent of the duties of those who become actors by virtue of its provisions. Correlative to the matter then discussed, is the subject designed for the present article, viz. the Extradition of Fugitive Slaves; both being distinctly declared subjects of constitutional establishment. On the former occasion neither the constitutionality of the Act, nor the right and authority of Congress to legislate on these interests were challenged. We think we are now prepared, and hence intend to show, not the mere unconstitutionality of that Act and its supplementary Act passed September 18th, 1850, or their want of conformity, in some, or all of their particulars, to the great instrument ordaining and establishing the United States Government; but that the National Legislature have no right, no power, no authority, over these subjects whatever. This abnegation of the legislative authority of Congress in the matter of fugitives from service or labor, coming now so late in the administration of the Federal Government, and after a silent acquiescence in the exercise of such power, since the closing years of the last century, may subject the proposition to doubt and obloquy, and render its truthfulness an idea difficult of reception; yet there are those who will hear both sides of the argument before rendering judgment, however strong may be the current sentiment to the contrary. We, therefore, present a programme of our article, which may be seen thus:

I. The paragraph in the United States Constitution (*Art. IV. § 2*), from which Congress claims to derive its authority for the Act of 1793, and its supplemental Act of 1850, is a compact or treaty stipulation devoid of any grant of legislative power, and containing nothing necessary in a charter of government, which for the most part the Constitution was intended to be, containing grants of power and the modes of its exercise: or,

II. The paragraph is itself a fundamental law, passed by the people

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of the States, above all other legislation, and not capable of any alteration or amendment, except by the people themselves, in the manner in which the existing amendments were made : and

III. The paragraph operates no investment of power in the government of the United States, or in any department or officer thereof (*Art. I. § 8*) ; and only inhibits the exercise of power by any State, in contravention of the right of extradition therein secured by a species of treaty entered into by the States, by its adoption in their conventions.

I. Our first inquiry then, in order to a solution of the question whether Congress has any power at all to legislate on the subject of delivering up fugitive slaves, must be into the nature of the instrument called the Constitution, or that item thereof which contains the provisions to which we have referred. If it shall appear that it contains provisions in no way called for by the necessity of the case as a charter of government, but which are mere compromises, barterings, "sops to Cerberus," to appease jealous spirits, and which, if stricken out of its pages, would not lessen its adaptation to the great end for which it was made, namely, the administration of a federal government ; provisions which would equally as well suit the exigencies of the states under the old articles of confederation, as under the new order of things ; language which more readily conveys the idea of a treaty stipulation between states, in their capacity of independent sovereignties, continuing to exercise all the original and inherent powers belonging to them before a general federative government was ever conceived of, than the idea of delegated power, surrendered sovereignty, or any other imparted attribute of the bodies politic of the several states ; or words which negative the idea of any legislative action on the part of the new government—then it will be manifest that its framers contemplated, in some particulars, something more than a mere constitution or charter of government. All difficulty vanishes when it is allowed in the argument that it was intended by the framers of the instrument to embrace in its grasp certain treaty stipulations, or agreements, to be observed by the states forever, or while the new government should continue to exist. Such stipulations would be none the less compacts for being incorporated with the great charter of the general government ; nor would they become any more the subject of its power for being so incorporated. If these stipulations contain no grant of power, then none is to be exercised ; if they do contain a grant of power, then who shall exercise it ? Will it be said that Congress shall exercise it ? Then why may it not intermeddle in the matter of other treaty stipulations made with foreign states and powers ? Why may it not legislate on the subject of the extradition of fugitives from justice, as seen in the late treaty with Great Britain, negotiated at Washington by our Secretary of State and Lord Ashburton ? The answer to all this may be found in the following language of the Constitution : " All legislative powers herein *granted*, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (*Art. II. Const. U. S. A.*) By way of abundant

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caution it is provided also in an amendment, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (*Art. X. Amend. Const.*) An analysis of that instrument, by which the general government was created, and by which it lives and moves, and has its being, will show that it sought to apportion its powers among the departments into which its administrators were severally placed, viz. the executive, the judicial, the legislative; that the powers intended to be exercised by each, are carefully enumerated, or defined in such manner that but little doubt can exist as to the intent of those who framed it; that it has a two-fold aspect in the creation of the government—the one exhibiting a grant of power, with a prescribed mode of its exercise, and the other a reservation of power, with imposed restraints upon its exercise. Indeed, all and singular the legislative powers that belong to the government, are grants; this is discoverable, *in limine*; the first line of the first paragraph of the Constitution, as seen above, evinces that Congress can exercise no power in legislation not granted by the Constitution. These gifts of power are equal in amount from every state.

II. We will now further inquire whether the language ("No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due," *Art. IV. § 2*.) contains a grant of power in the sense contemplated by the first article of the Constitution above quoted. To this end we will bring before us *all* the legislative powers expressly *granted* in the Constitution; we have seen that they are exclusively vested in Congress; we place here all those that are enumerated or expressed, as they are grouped together by the Constitution itself. "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States; to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; to provide for the punishment of counterfeiting the securities and current coin of the United States; to establish post offices and post roads; to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; to constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain

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a navy ; to make rules for the government and regulation of the land and naval forces ; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions ; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress ; to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings ; and to make all laws which shall be necessary and proper for carrying into execution the foregoing power." (*Art. I. § 8.*) Let the law makers in Congress point out in this enumeration, if they can, the warrant for their legislation on the subject of fugitives from service or labor. But there is yet a remnant of authority in the great charter for the exercise of legislative power : it is the final clause of the section just given above, and which was omitted in that quotation, to give it the greater prominence and higher importance in this place, by itself—that extract showing what powers of legislation were granted in express terms by the Constitution ; this showing that Congress have, in addition to those grants, the power to make such other laws as may be necessary and proper for carrying into execution certain other undefined and nameless powers vested in the United States Government, or its officers. "To make all laws which shall be necessary and proper for carrying into execution—all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." We repeat, let the legislators at the Court of Washington, find warrant, express or implied, in this last quotation for their law of 1793, and its fellow, the great peace measure and peace-maker of 1850. Besides, let them show, if they can be found in the pages of the Constitution, any other grants of legislative power than those here collected. *All legislative powers herein granted!* quoth the Constitution : are there any others granted besides those we have cited ? We do not discover any others. If the authority to enact these laws be not found among the enumerated legislative powers of Congress ; if these laws themselves are not "necessary and proper for carrying into execution the foregoing powers," that is, those we have spread upon the record above (the affirmative of which seems too absurd for the credence of any sound mind) ; and if the Constitution has not vested in the Government of the United States, or in any department or officer thereof, "other powers," besides those we have shown above, requiring legislation for carrying them into execution (and it remains to be seen that any *other powers* have been vested requiring the Acts of 1793 and 1850), then we must make further search still for the fountain of this legislative authority.

III. We will now revert to the passage in the Constitution (*Art. IV.*

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§ 2.) already given above, and which we have considered to be in the nature of a treaty stipulation entered into by the States, and only binding as such, and to be construed and received as all treaties or conventions of independent foreign powers are construed and received by the general government—the principle of the case being the same, whether the compact or treaty were entered into by and between domestic or foreign states. It is in this section alone that we find anything relating to the extradition of the fugitive slave. What is it intended to embrace? A grant of power, or prohibition of its exercise? Certainly not a grant or vestment of power, in any sense used elsewhere in the Constitution. Its language has no terms of gift or investiture; if power, however, has thereby been given, it is lodged somewhere. In which department, or officer of the government, may it be found? It is silent in this behalf. If it contain a grant of power which is not enumerated, it must be found among those other powers which may be vested in the Government, or some of the departments—it certainly does not contain any powers which are enumerated in the eighth section of the first article, and which we have copied. We must seek for it then among the non-enumerated, or “other powers” mentioned in the article. These views are fully fortified both by principle and authority. “The Constitution of the United States is an instrument containing the grant of *specific* powers, and the Government of the Union cannot claim any powers but what are contained in the grant, and given either expressly, or, by necessary implication.” (*Kent’s Com. Lect. XV.*) Besides, if the section contain a power, it is of great importance in our inquiry, whether that power be executive, judicial, or legislative; for if it be not legislative, then Congress are forever barred and estopped in the original exercise of its functions in that behalf, and must wait till its legislation is invoked by the necessity and propriety of the case. We have seen that the Constitution may vest power in the Government generally, or in a department of it, or in an officer belonging to it; the language is explicit:—“other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof:”—and we have seen also that Congress has power to make such laws as may be necessary and proper to carry into execution the powers so vested. It is admitted, therefore, that if the extradition section of the Constitution, which we have given above, vests, in terms or by implication, power in the Government generally; or, in the executive, judicial, or even legislative departments; or, in any individual officer of the Government, and that if this vested power needs the aid of laws to carry it into effect, then Congress may furnish its enactments, and those of 1793 and 1850 are legitimate. It becomes, therefore, a question of necessity and propriety—Congress, or the legislative department, can have no original jurisdiction to make a single law to enforce or carry into execution a non-enumerated power. Now it never will be claimed that the extradition clause of the Constitution has within it any expressed or enumerated powers, giving to Congress legislative authority—if there be found in its construction a single grant of power of any kind, whatsoever, that power must lie dormant till it be necessary and

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proper that laws be made to carry it into execution. If it be a power that cannot be exercised, or in the language of the Constitution, cannot be *carried into execution*, without the help of Congressional aid in the shape of laws, this necessity alone confers jurisdiction on the law-making department; nothing else. Till there has been a failure in Government, in some of its departments, or in its officers, to be able to execute any power that may lurk in the language of this section, how can it be said that these laws are necessary and proper. It cannot be gathered from these laws themselves that any such necessity or propriety called them into existence—they have neither preamble or title, indicative of the facts and circumstances that should give them birth—viz. inability on the part of the department or officer upon whom the execution of the vested power has been devolved, to carry it into execution. Nor is there any historical reminiscence in the action of the federal government, throughout all its various bureaus and departments of office, from the day of the adoption of the Constitution to the present, going to demonstrate that the executive, the judiciary, or any officer of the government, found itself or himself too impotent to execute any and every power that may belong to them to enforce. If the records of the past are silent as to any need of Congress making such laws—if such laws as their wisdom has dictated and placed upon the statute-book, do not carry internal evidence of any necessity for their enactment—and if the archives of the government contain neither memorial nor remonstrance from the people, the President, the departments, or any government officer, for a law in aid of the power concealed in the letter of the section under review, (as it is fully believed they do not,) it is strong presumptive evidence at least, that no such power exists, as is claimed; or if there be such, *in esse*, that it ever needed the help of the legislative arm of the Government.

Again; suppose the section does vest power somewhere; we are next to locate it. Let it be placed (1.) in the executive department. What necessity for a law of Congress to aid the President in carrying the power into execution? What urgent need for a law to help him in enforcing the power? Did necessity ever clamor, at his behest, for such laws to aid him? When this department has signified its impotency to execute any power supposed to be contained in this section, it will be in time for the law-makers to act; as we have before said, their power to legislate on this subject is conditional and dependent. But has not this branch of the Government always disclaimed the exercise of any such power? perhaps for the high reason that the President can discover none vested, by the section, in the Government or in his department. In any event, whether from the non-existence of a vested power in his department, or from a lack of necessity to give it jurisdiction, a very helping and kind Congress has never yet sought to aid that department by its laws in the matter of the extradition of slaves.

(2.) Let this supposed vested power be placed in the judicial department. What necessity again for laws to aid the Federal Courts in the exercise of this vested power? are their powers not plenary under the Constitution, and can they need the special legislation of

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Congress? are they the recipients of these mysterious other powers which the Constitution has vested in them, and withal so powerless of themselves that it is necessary and proper for laws to be made to carry them into execution? This department is composed of the *Supreme Court*, the *Circuit Courts*, and the *District Courts*; in these *Courts* the Constitution has vested all the judicial power known to the United States Government; no power in this behalf is vested in any federal judge not acting as a Court;—as Courts, the only capacity in which it is possible for the judges to act in reference to the section under consideration, what legislation is or can be necessary? till some need be discovered in this department of the Government, Congress can again have no jurisdiction. The condition ever remains the same; “laws which shall be *necessary* and *proper* for carrying into execution—other powers vested.” Among the expressed or enumerated powers of Congress, as we have seen above, it may “constitute tribunals inferior to the Supreme Court;” these *tribunals* are the Courts in which the third article vests all the judicial power not exercised by the Supreme Court. This constituting of Courts, then, is by express provision, and is not derivable from those other vested powers, which may, or may not, call for auxiliary legislation. In these Courts, or tribunals, words synonymous, we find deposited all the judicial power; we have seen that Congress have power to *ordain and establish inferior Courts*; and to *constitute tribunals inferior to the Supreme Court*; this being done, it can legislate no farther, till it shall appear that the Courts, as constituted, do not answer the end of their constitution—that other powers vested in the judiciary department, call for laws, helping to execute them, not previously enacted. We can discover nothing for Congress to do after having constituted the Courts; this labor finished, the judicial power vested in them by the Constitution, found its way thither by necessary affinity, and filled the measure of this department. Now if the section under examination vests any power in this branch of the Government, which needs or properly requires a law of Congress to carry it out, and which that body neglected to provide when legislating by express command of the Constitution, in the earliest days of the government, then it must be enacted. This need or propriety of such law we can never allow, while the Courts are constituted as they are at present. The power of Congress, in respect to this department, ceased the instant the Courts were organized—their authority extended no further, under express warrant, than to this point; the power of the Courts began to operate the instant they were organized, and from that time to this they have had by right of constitutional investment, every possible case arising under that instrument, the laws made by Congress, and treaty stipulations, foreign or domestic. The laws, therefore, made by Congress in 1793 and in 1850, in respect to the extradition section, are without any warrant from the Constitution:—beside there being no warrant for the enactment of these laws, they are worthless, even supposing a warrant did exist for their establishment; because it is clear that the supposed power, vested in the judicial department, and needing them to aid it in carrying the power into effect, has in these laws no exe-

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cutive agent recognized by the Constitution. These laws make no provision for a single act, decision, or determination by any *Court*—they leave all these things to judges, justices of the peace, commissioners, etc., out of Court; and not a single section contemplates the action of any federal court or tribunal, in which the Constitution expressly declares all such powers should be exercised! If the Constitution confides the power in question, as we believe it does, to the federal courts, in the original exercise thereof, and not federal judges, etc., out of Court; and if Congress has no part to act till some necessity signified by the Courts shall demand its action, it follows that laws may not be made at the will of that body, without necessity shown, or any propriety seen, and merely to gratify capricious, if not malicious persons. Again, the power contained in this section, if there be any, in order to be exercised by this department, must be judicial, because all its duties are of that character; its language does not define any power, nor does it reveal its nature. Let it be conceded, however, that whatever it may be, it properly belongs here; no legislation can reach it with aid or hindrance, while within the folds of the ermine, till the imbecility of the bench in its enforcement, shall prompt the necessary statutes: these laws are then only collateral and auxiliary; the judges all the while deriving their authority to act from the power devolved upon their department by the Constitution, and not by the Acts of Congress: but if the Courts can exercise judicial authority in the matter of this section, only by virtue of an Act of Congress, it cannot be said that this power finds lodgment in the judicial department.

(3.) Let the power concealed in the section under consideration, be placed in the legislative department. It follows, if it belongs here, that it is legislative, and can be exercised by Congress as a body; carried into execution in some way by itself, through its officers perhaps; but this body have not yet so considered the section: there is no evidence that this assemblage ever considered itself the depository of this power, and undertook to exercise it within its own borders by committees, by sending for persons and papers, and other appliances known to its organic action. It is absurd to suppose such power, if any exist, and be devolved on this branch of the Government, to be a law-making power; indeed, it can exercise no other, and hence it may be seen that the "other powers," as contra-distinguished from the foregoing or enumerated ones, in the eighth section, do not vest in Congress, and consequently this power, being classed among those other powers, is not to be carried into execution by Congress. It can make laws for some other body, or department, to carry the power into operation only when the necessity and propriety of the case demands it. The two unfortunate laws made by it, in aid, as it is thought, of the judiciary department, lack the evidence of their being "laws which are necessary and proper for carrying into execution powers vested by the Constitution" in that department, as it can execute no powers except through the constituted Courts; they do not in a single provision contemplate an act of Court; their whole structure and outline, are beyond and without the limits of any tribunal known under the Constitution; our argument, however, is not

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with respect to their constitutionality—but with the power of Congress, in legislation, under the section which we have all along considered: “No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers or enact laws beyond the powers delegated to it by the Constitution; but it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby.” (16 Peters’ Rep. *Prigg v. The Commonwealth of Pennsylvania*.) Such is the language of Judge Story, who is seeking to justify certain legislation by Congress; the same acts which we have called in question above. He seems to confound the terms, rights and duties, with that of powers used in the Constitution. If he had said that Congress had made “laws which were necessary and proper for carrying into execution, powers vested by the Constitution in the Government,” and which powers alone and unaided by any legislation, could not be exercised so that rights expressly given and duties expressly enjoined by such powers, would never be enforced or performed, for lack of the means of enforcement or performance, to wit, necessary and proper laws—he would have said that with which we could have no disagreement, because such sentiment quadrates with our views above set forth. We leave the oracle on our page for examination.

Having shown, as we think, that the section in question is a species of treaty, or compromise, between the States, destitute of any grants of power rendering legislation necessary and proper; that the federal courts are endowed by the Constitution with all the means and appliances needful to enforce all the rights given and duties enjoined by the same; and that the section, if it do invest any powers in the Government, must be carried into execution by laws which were made necessary by reason of the failure of those powers to secure the end for which they were created, a thing never yet occurring in the administration of the Government—we will now dwell for a moment and inquire

IV. Whether the section before us is anything more than a great restraining and prohibitory enactment of the nation, and only intended to inhibit the exercise of state sovereignty in the matter compromised by its provisions. That it is more or less than such may well be questioned—though not arranged in the Constitution among the restraints of power upon the states, in consecutive order of the prohibitory paragraphs, yet its language is remarkable for its verisimilitude to them; it was one of the last things settled upon by the convention which framed the Constitution—and hence, perhaps, its place among the articles at the extremity, rather than among those of its class in an earlier page. At all events, it is historically true of this section, that it is a compromise, and contains restraints upon the exercise of any State legislation adverse to the extradition of a fugitive slave; we say *adverse*, because its language warrants the assertion that it is only against “any law or regulation” in the States that shall *obstruct* the reclamation, that the prohibition is aimed. It never was designed that the new government should do more in the premises, than to see that this fundamental law, this treaty

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stipulation, be executed. Federal legislation was never contemplated. Neither was it then, nor is it now necessary. It is provided in the enumeration of the duties of the President, that "he shall take care that the laws be faithfully executed"—this section is one of those laws belonging to him to execute, or in other words, whether it contain a grant or prohibition of power, it vests in the executive department. We have said above that the chief magistrate of the nation never asked Congress to legislate in his aid in this behalf. But again : we construe this section to mean that the States are the actors, through their constituted officers or authorities. The restraining power of this section fixes upon the State statutes, and decrees that they may not "discharge" the fugitive ; it has to do with the duties of the State alone—it is no more negative in the matter of discharge, than it is positive in the matter of surrender : both are compatible with State action, and to such does the section most clearly look. This section is the ligament with which the strong man is bound hand and foot, into whose keeping the fugitive hath fled. The pursuer must have unobstructed pursuit. His claim is upon the State, not upon the fugitive, as may be seen in the analagous case of the fugitive from justice, in respect to whose extradition the adjacent section provides. Whenever a State shall, by its legislation, be in conflict with this treaty or compromise, and be found in the attitude of a violation of the faith of treaties, and the President cannot with the compulsory power in his hands, execute this part of the Constitution, it will be in time for Congress to make a law to carry into execution his feeble powers ! Such legislation, and that only, is legitimate.

V. It remains only to consider whether the section in review is a law in such sense that it is supreme. This needs no more affirmative proof than a section of the Constitution, which we will place before us. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the SUPREME LAW of the land." (*Art. VI.*) It is enough, perhaps, for us to know that the section is a law of the land, whether its nature be that of a treaty, and so ought to be handled in its construction ; it being of no importance what name may be given to it, or however it may be classed among the powers or prohibitions of the Government.

This section has received only sparing attention from writers on the Constitution. It seems to have been carefully avoided by all publicists, whose works we have consulted. Kent, Story, and others, it would seem, when commenting upon the Constitution, might have given the *questio vexata* of the United States Government, an examination commensurate with its importance. These great luminaries of the law owed it to the American people. This they have not done. We will conclude these considerations by a quotation from one of our writers on the Constitution, in proof of our positions taken above :

"As soon as the Constitution was adopted, all legislative measures for the purpose of enforcing existing treaties, either on the part of the United States or the States, became at once unnecessary. The institution of the judicial power was itself adequate to the desired effect. The partial views and local interests which might have influenced

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State legislatures, or the high tone which might be jealously imputed to the general legislature, were equally avoided. The people, by the adoption of the Constitution, had themselves *legislated* on the subject, and the judicial principle, in regular and dignified procedure, carried their legislation into effect." (*Rawle on the Const.* p. 322.)

H. D.

H. S. Circuit Court.

[Southern District of New-York.]

IN EQUITY.

Before the Honorable SAMUEL NELSON, one of the Assistant Justices of the Supreme Court of the United States.

SAMUEL C. JOLLIE v. JOHN D. JAKUES and JAMES M. JAKUES.

COPYRIGHT OF MUSICAL COMPOSITION—DELIVERING A COPY OF COMPOSITION TO LIBRARIAN OF SMITHSONIAN INSTITUTE AND A COPY TO THE LIBRARIAN OF THE CONGRESS LIBRARY, NOT A PRE-REQUISITE TO A TITLE TO A COPYRIGHT—COPYRIGHT TO THE TITLE OF A BOOK, COMPOSITION, ETC.—INJUNCTION—ISSUE OF LAW.

Although by the 10th section of the act of congress, passed August 10th, 1846, ch. 178, establishing the Smithsonian Institute, it is provided that the author or proprietor of any book, map, chart, musical composition, &c. for which a copyright shall be secured under existing acts of congress, or those which shall thereafter be enacted respecting copyrights, shall, within three months from the publication of the said book, &c., deliver or cause to be delivered, one copy of the same to the librarian of the Institute and one to the librarian of the congress library for the use of the libraries, the delivery of such copies is not a pre-requisite to a title to a copyright. It seems, however, that the question is not free from some doubt. To entitle a person to a copyright for a musical composition, it must appear that such composition is substantially a new and original work; and not a copy of a piece already produced, with additions and variations which a writer of music with experience and skill might readily make.

Where the evidence, as to the originality of a composition, is of a contradictory character, the court will suspend a motion for an injunction to restrain the defendants from an infringement of the copyright, and direct an issue of law upon the question.

The title or name, is an appendage to the book or piece of music for which a copyright is taken out, and if the latter fails to be protected, the title goes with it.

THE bill alleged that George Loder, in his capacity as musical director of Burton's theatre, had re-arranged and adapted for the purposes of the dance, a German musical composition, known as the Röschen Polka, which had never been republished in this country and had arranged the same for the piano, giving to his adaptation and rearrangement the title of "The Serious Family Polka." That he had taken out a copyright for this piece of music, and had assigned it to the complainant, and that the defendants were violating that copyright by the publication and sale, under the *same title*, of a piece of music, which was alleged to be a copy or colorable imitation of the one published and copyrighted by Loder.

The defendants denied that the one published and sold by them was

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such a copy, claimed that it was an original and different adaptation of the same German air; and that neither the piece of music published by the complainants, or its title, was entitled to the protection of the copyright law.

J. W. Gerard and T. C. T. Buckley, for defendants, cited Act of 1831, § 1, vol 4, St. at Large, p. 436; Curtis on Copyright, p. 145, 281, 296, 298; *D'Almeida v. Boosey*, 1 Young & Coll. Exch. R. 288.

B. F. Butler and John C. Devereux, for complainants, cited Curtis on Copyrights, pp. 170-182, 293, 294, 295-298; 17 Vesey, 338; 8 Vesey, 215; Gadson on Copyright, 2.5; 3 Story, 768.

NELSON, C. J.—This is a bill filed to restrain the defendants from an infringement of the complainant's copyright in a musical composition known as "The Serious Family Polka; danced nightly, with rapturous applause, at Burton's Theatre;" arranged by George Loder.

The author assigned his interest in the same to the complainant, who, on the 19th of February last, deposited the title of the piece with the clerk of the District Court, and on the next day, the musical composition itself, in pursuance of the act of congress of 3d February, 1831, for the purpose of securing the copyright.

The first section of that act provides, among other things, that any person being a citizen of the United States, or resident therein, who shall be the author of any book or books, map, chart, or musical composition, or the legal assigns of such person, shall have the sole right and liberty of printing publishing and vending such book, &c., or musical composition, in whole or in part, for the term of twenty-eight years, from the time of recording the title thereof.

The fourth section prescribes, that no person shall be entitled to the benefit of the act, unless he shall before publication, deposit a printed copy of the title of such book, &c., or musical composition, in the clerk's office of the District Court, wherein the author or proprietor shall reside; and it is made the duty of the clerk to record the same in a book kept for that purpose. And the author or proprietor shall also, within three months from the publication, deliver, or cause to be delivered, a copy of said book, &c., or musical composition, to the clerk of said district court; and it is made the duty of the clerk also, at least once in each year, to transmit a certified list of all such records, together with the several copies of books, musical compositions, &c. deposited, to the Secretary of State, to be preserved in his office.

The fifth section prescribes that no person shall be entitled to the benefit of the act, unless he shall give information of the copyright being secured, by causing to be inserted in each of the several copies published, during the term secured, on the title page, or the next page, if a book, or on the face of a musical composition, the words: "Entered according to act of congress, &c., by A. B., in the clerk's office of the District Court, &c."

It will be seen, therefore, by the provisions of this act, that there are three preliminary steps requisite to the securing of a valid copyright.

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1. The deposit of a printed copy of the title, before publication, with the clerk of the District Court. 2. Notice to the public, by printing, in the place designated, the fact of entry in the form prescribed by the statute; and 3. The deposit with the clerk, of the book, or musical composition, within three months from the date of publication.

The 10th section of the act of congress, passed August 10th, 1846, ch. 178, establishing the Smithsonian Institute, provides that the author or proprietor of any book, map, chart, musical composition, &c., for which a copyright shall be secured under existing acts of congress, or those which shall thereafter be enacted respecting copyrights, shall, within three months from the publication of the said book, &c., deliver, or cause to be delivered, one copy of the same to the librarian of the Institute, and one to the librarian of the congress library, for the use of the libraries.

No penalty is declared in the act, as a consequence of the omission to comply with the provision; but it is insisted by the counsel for the defendants that a construction should be given to the section, making the delivery of copies a pre-requisite to a title to the copyright, under the act of 1831, as otherwise, the provision would be practically ineffectual to accomplish the object intended.

The law may be defective in this respect, for want of a penalty to enforce it; but we are unable to perceive how the construction contended for can be supported upon any sound view of the section. It is found in an act establishing the Smithsonian Institute, and does not purport to be an amendment of the act of 1831, providing for the copyright of authors; and besides, the duty is imposed upon the author or proprietor of any book or musical composition, for which a copyright shall be secured under existing acts of congress, or those which shall hereafter (thereafter) be enacted, thereby necessarily excluding any implication that it was intended to make the delivery to the respective libraries a condition to the vesting of the title to the copyright. The duty is enjoined upon those who have already acquired the right, and upon those only, and no forfeiture is declared in case of a non-compliance. It would be a violent construction of the provision to annex this penalty by judicial interpretation. Every sound rule on the construction of statutes is against it. Courts lean against the enlargement of penal statutes beyond the fair and necessary import of their terms, much more will they lean against the creation of a forfeiture by implication, in the absence of any words indicating such intent.

In the case of *Wheaton v. Peters*, (8 Peters, 591, 663, 665.) which arose under the acts of congress passed May 31, 1790, and April 20, 1802, it was decided by a divided court, that the publication of a copy of the record, as entered in the clerk's office of the District Court, in the newspapers within the two months, and the delivery of a copy of a book to the Secretary of State within the six months prescribed by the 3d and 4th sections of the former act, were pre-requisites to the title to the copyright. But these acts were parts of the system, and steps required to be taken by the author or proprietor to entitle himself to the exclusive right granted under it; and besides, the language of the first section of the act of 1802, which

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was supplementary to that of 1790, was regarded by a majority of the court, as having, in terms, made the publication in the newspapers, and the delivery to the Secretary essential to the vesting of a complete title. But even in that case, two of the learned judges dissented, maintaining that the title to the copyright immediately vested on the deposit in the clerk's office of a copy of the title of the book, and the insertion upon the title-page of the fact, that an entry had been made according to the act of congress; and, that the subsequent steps prescribed by the statute were only declaratory, and that the omission did not work a forfeiture.

The question here is very different from the one decided in that case. The provision is found in a separate act—one relating to a different subject, and not referring to, or purporting to be an amendment of the copyright act of 1831; nor embracing within it any language indicating an intent to make it a condition of the title. The delivery of the book or musical composition, is simply a duty enjoined upon the author or composer, who has secured, and is already in the enjoyment of his copyright, under existing acts of congress. The obligation to deliver, does not attach till the right is secured.

It is very probable that congress designedly omitted to annex any penalty in case of neglect to furnish the librarians with the copies; intending that the provision should be declaratory only, leaving it optional with the authors to deliver them or not.

The expense, in this case, and in many others, would be of no great importance; but in the case of elaborate and expensive works, and on the renewal of the copyright, after the expiration of the twenty-eight years, of a series, the tax would be heavy and exceedingly onerous. It would deserve great consideration, on the part of congress, if the question was before them, whether it would be expedient or just to impose this burthen upon authors.

As this question is one of considerable interest to authors and proprietors of works, the property in which depends upon a compliance with the requirements of the copyright act, it is to be regretted that any provision of that act involving the title should be open to observation. Although we are quite clear that the view above taken is a sound one, and supported by the application of well settled rules of construction, yet it cannot be denied, but that some doubt must rest upon the question until it is settled by the paramount authorities. In the mean time, it will doubtless be most prudent for authors to conform to the provisions of the act of 1846.

The bill of the complainant charges, that one George Loder, a musical director in Burton's theatre, prepared the music performed in connection with, and as part of the comedy called and known as "The Serious Family," particularly the music for the Polka dance in said comedy; and, that he had expended much labor, time and musical knowledge and skill in preparing and producing the same; that he took and selected as the basis of said musical Polka, a certain composition of a German musician, published in Europe, but not republished in the United States until taken and selected by the said Loder; that said Loder made a new application and use of said German music for the purposes of this comedy; and with a view to

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a further publication, re-arranged the said composition, and by improvements and additions, and new forms and combinations, adapted the same to the dance forming part of the comedy; and further, that the said Loder also arranged the said musical Polka as performed at the theatre, for the piano-forte for publication, and for public and general use; and assigned his interest in the same to the complainants in this suit, who, on the 19th of February last, took out a copy-right under the title already stated. That the music was in great demand, and the sales very profitable, until the piracies committed by the defendants, also set forth in the bill. The complainants pray for an injunction and an account, &c.

The defendants, in opposition to the motion for the injunction, deny that they have published or are engaged in selling any Polka which is similar in plan, or matters to, or is a substantial copy of, that published by the complainant; or, that they have adapted, used or embodied in the one published by them, either the matters, arrangement, or additions of the musical composition contained in that of the complainant. That the Polka called "The Serious Family Polka," published by them was composed and written in a different key, and contains eight bars of original matter; and that the only similarity consists in the melody, which, in both publications, was taken from a German composition, called "The Röschen Polka," well known, and which had been played by various bands in the city of New-York; and especially by a band known by the name of "Munck's Band," before the publication of the complainant; and that Loder had made no change in the melody of the Röschen Polka, nor had he added any new matter to the composition; or to the combination of the materials of the original air; but had simply adapted the old melody to the piano-forte.

It is further shown by an expert composer who had examined and compared the two pieces of music, that the one published by the defendants was not only corrected in a different key, but that the first, third, fourth, fifth, seventh and sixteenth bars of the first part of the two editions, differ in the arrangement of the treble and bass notes of each bar; and in the second part, the first, third and fifth bars, differ in the arrangement of the bass notes; and the second, fourth, and sixth bars, in the arrangement of the treble notes; and the seventh bar of the same part in the arrangement of both treble and bass notes; and further that the portion marked trio in the defendants' edition, containing eight bars, is different in all respects from the same part of the Polka published by the complainant; and that to the finale of the Polka of defendants, are added eight bars of original matter not found in any portion of the complainant's edition; that the music of this edition in the melody is taken substantially from the "Röschen Polka," the only difference being that the latter was arranged for the clarionet, and the former by Loder, for the piano-forte; and that the arrangement and the adaptation of the music composed for one instrument to another, requires but an inferior degree of skill, and can be readily accomplished by any person practised in the transfer of music.

The act of congress of February 3, 1831, authorizes the grant of

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a copyright to the authors of a "musical composition," and the principal question in the case is, whether the arrangement and adaptation of the music in the "Röschen Polka," already composed and in public use, to the "Serious Family Polka," is, or is not a musical composition within the meaning of the statute.

It is not claimed that Loder is the author of the melody or air; but simply that by skill and labor he has adapted it to a new use, or to a new instrument, the piano-forte for instance, instead of the clarionet.

Under the statute of Anne, in England, it was held that a musical composition was protected by a copyright within the words "books or other writings;" and now, under the 5 and 6 Vict. ch. 45, § 2, it is declared that in the construction of the act, the word "book" shall be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letter-press, sheet of music, &c., and under these acts it has been determined in effect that the arrangement and adaptation of a well known air, either by changing it to a dance, or by transferring it from one instrument to another, is not a work entitling an author to a copyright. (*D'Almaine v. Boosey*, 1 Young & Coll. Exch. R. 288.)

The composition of a new air or melody is entitled to protection, and the appropriation of the whole or any substantial part of it without the license of the author, is a piracy. How far the appropriation might be carried, in the arrangement and composition of a new piece of music without an infringement, is a question that must be left to the facts in each particular case.

If the new air be substantially the same as the old, it is no doubt, a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty, and the addition of variations makes no difference. The original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment.

The musical composition contemplated by the statute must, doubtless, be substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make. Any other construction of the act would fail to afford the protection intended to the original piece from which the air is appropriated. The new arrangement and adaptation must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author; otherwise the copyright would be worthless. That portions may be taken and mixed up in the new arrangement and composition, cannot probably be denied; and there may be great difficulty in distinguishing between those new compositions that do, or do not absorb the merit of the original work. Each case must depend upon its own particular facts and circumstances. Persons of skill and experience in the art must be called in, to assist in the determination of the question. It may often be a very nice one.

It is admitted in the bill, in the case before us, that the basis of the arrangement in the "Serious Family Polka" was taken from a Ger-

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man musical composition ; and it is further insisted by the defendants, that it is nothing more than a substantial copy of that piece ; the whole of the air being the same, with slight and unimportant variations, which any person of ordinary skill and experience in music could have made.

The evidence on this part of the case is conflicting, and not sufficiently full to enable us to determine on which side the truth lies. We shall therefore suspend the decision on the motion for the injunction, and direct an issue at law upon the question ; and that in the mean time, the defendants keep an account of the sales, and report to the clerk monthly under oath.

It has been argued on the part of the complainant, that the name or title of his piece of music is original in the connection in which it is used, and that, conceding the musical composition itself not to be within the protection of the statute, still he is entitled to the injunction to restrain the defendants from the use of the same name in their publications.

It must be remembered that this is a suit founded upon the copyright act, (see Act of Cong. Feb. 15, 1810, in connection with the Act of Feb. 3, 1831,) and in order to maintain it, the complainant must make the title under his copyright. Independently of this ground, we have no jurisdiction of the case, as both parties are residents, and for aught there appears, citizens of New-York.

The question, therefore, whether the court will interfere to prevent the use of the title in fraud of the complainants, upon principles relating to the good will of trades, is not before us.

The act of 1831 grants a copyright to the author of a "musical composition," provided he complies with the requisitions therein prescribed, and among others, deposits the title with the clerk of the court, who shall record it at length, and afterwards deposits a copy of the work within three months. The right secured is the property in the piece of music, the production of the mind and genius of the author, and not in the mere name given to the work. That is essential, as well in taking out the copyright as in identifying the composition protected ; sometimes, doubtless, the source of as much profit as the intrinsic merit of the work itself. But it is not the thing protected or intended to be protected. There need be no novelty or originality in it, nor even the production of the author for any thing in the act ; it may be taken from the suggestion of a friend, or picked up from any source, as the author may desire.

The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident.

We do not say how the question might be decided in the case of a valid copyright of the work, and an infringement of the title by the defendants. That would be a different question. It may be that the title should be considered as falling within the purview of the statute, and that a protection of the work would require the security of the title from piracies. But we express no opinion on this question.

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The proposition assumes that the piece of music is not protected within the statute ; and if so, we think it clear the name is not also. It must abide the result in this respect of the thing to which it is attached.

N. Y. Supreme Court.

[General Term, October, 1850.]

Before EDMONDS, EDWARDS, and MITCHELL, Justices.

RICHARD GILDERSLEEVE AND WILLIAM ROBERTS, *Plaintiffs in error*, v.
THE PEOPLE, *Defendants in error*.

It is not necessary in a recognizance taken to answer a criminal charge, to state the facts which give the magistrate jurisdiction. The entering into the recognizance, being the voluntary act of the party, he admits the authority of the magistrate, and acknowledges the regularity of the proceedings in which it is taken.

A recognizance need not state the particular charge which the principal is bound to answer ; and the fact that the condition is general, furnishes no just ground of complaint, as the parties entered into the recognizance voluntarily.

Where the condition of the recognizance is that the principal shall appear at the next court of the general sessions of the peace, and answer all such matters and things as shall be brought against him, and abide the order of the court, and not depart the said court without leave, the condition is not answered by an appearance merely at the next term of the court after the recognizance is taken. The legal effect of such a recognizance is, that the principal shall appear at the next court of general sessions, and answer such charge as shall be brought against him, and be forthcoming before the court at *all times until discharged*.

The statute of 1844, which allows a judgment to be entered in the office of the clerk of the city and county of New-York, upon a recognizance given to answer a criminal charge, upon filing the recognizance, with a certified copy of the order of the court forfeiting the same, is not in contravention of the provision of the constitution of 1821, which declared that the trial by jury, in all cases in which it had been theretofore used, should remain inviolate forever—the trial by jury not having been used in the case of a forfeited recognizance before the adoption of the constitution.

If a recognizance upon which such judgment is entered has been discharged, the parties may be relieved by motion in the Court of Common Pleas of the city and county of New-York. *Semble*, If that court could not give relief on motion, a court of equity would interfere in a proper case.

The act of 1844 did not change the character of the liability of a party to a recognizance entered into before its passage ; it merely introduced a more summary remedy.

ON the 7th February, 1843, the plaintiffs in error entered into a recognizance, before one of the special justices for preserving the peace in the city of New-York, by which they acknowledged themselves to owe to the people of the State of New-York the sum of \$1000, to be levied and made of their respective goods and chattels, lands and tenements. The condition of the recognizance was, that if Gildersleeve, one of the plaintiffs in error, should appear at the next Court of General Sessions of the Peace to be holden in and for the city and county of New-York, and then and there answer all such matters and things as should be objected against him, and not depart the said court without leave, and in the mean time keep the peace toward the people of the State of New-York, and particularly towards John P. Duff, for the term of three months, then the recognizance should be void, otherwise to remain in full force and virtue.

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On the 21st February, 1845, the Court of General Sessions ordered the recognizance to be forfeited, and that the same, together with a certified copy of the order of forfeiture, be filed in the office of the clerk of the city and county of New-York, that judgment be entered therein according to law, against Gildersleeve, the principal, and Roberts, the surety; and judgment was entered and docketed accordingly.

The plaintiffs sued out a writ of error for the purpose of reversing that judgment.

N. B. Blunt, Brown and Matthews, for plaintiffs in error, argued the following points:

First. The judgment entered in the New-York Common Pleas, is void upon its face.

I. The act of 1844, by virtue of which this judgment is created, is unconstitutional. (Sess. laws of 1844, p. 475, § 8.) It deprives a defendant of the right of trial by jury. It deprives him of the opportunity of setting up any defence he may have, by pleading or otherwise. (*The People v. Bartlett*, 3 Hill, 570; *The People v. Green*, 5 Hill, 647.)

II. The recognizance upon which the judgment is bottomed, is void upon its face, for want of jurisdiction in the officer taking it. It does not describe the offence for which indictment was afterwards found. (4 Wend. 387.) It describes no offence. (2 R. S., 1st ed., 691, 692, § 8; *The People v. Brown*, 23 Wend., 47; *The People v. Koeber*, 7 Hill, 30; *The People v. Young*, *ibid*, 44; *The People v. Kane*, 4 Denio, 530.) At the utmost it is a mere recognizance to keep the peace.

III. There is nothing in the record, to show a forfeiture or breach of the recognizance entered into, on the 4th of February, A. D. 1843. The recognizance was to answer "matters and things in general," and to keep the peace toward Ann Hulse in particular: and the indictment described in the order of forfeiture was for forgery in the second degree. For aught that appears, the indictment was for an offence committed after the giving of this recognizance. The condition of the recognizance, was to appear at the March term, A. D. 1843, and there is nothing in the record to show a breach at that time, or a respiting over or a continuance of the recognizance from that term to February, 1845, (the term when the order was made,) which latter should have formed part of the order declaring the forfeiture. (*The People v. Hainer*, 1 Denio R. 454; *The People v. Crary & Fleming*, 17 Wend. 374; *The People v. Green*, 5 Hill, 647.) The proceedings of the New-York Court of General Sessions of February 21st, A. D. 1845, were without jurisdiction, and void. It does not appear that the defendant was called at the term named in the recognizance, or notice of a future requirement to appear, given to him or his bail.

IV. Under the act of 1844, every thing necessary to show breach and jurisdiction should be affirmatively set forth in the order forfeiting the recognizance. It is a summary proceeding, and every thing

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necessary to show jurisdiction must affirmatively appear. (*Miller v. Brinkerhoff*, 4 Denio, 118.) The order of forfeiture is in the nature of the declaration before the act of 1844, and should contain special averments of facts, showing jurisdiction to make the order. (*The People v. Hainer*, 1 Denio, 454; *Sackett v. Andross*, 5 Hill, 327; *The People v. Koeber*, 7 Hill, 39.)

V. The act of 1844 does not apply to a recognizance given in 1843.

Second. The judgment docketed in the New-York Common Pleas, should be reversed with costs.

J. M'Keon, contra, argued the following points :

I. The recognizance was taken in a case in which the officer taking it had authority. It is in proper form. It is not necessary to state all the facts and circumstances under which it was taken. (2 R. S. 704, §§ 4, 7; *People v. Kane*, 4 Denio, 544, 545; *People v. Blankman*, 17 Wend. 255.)

II. By terms of recognizance, the bail was bound to have his principal in court to answer *any charge*, not merely that in which he was recognized to appear. (*Petersdorf on Bail*, 510; 10 Wend. 433; 17 Wend. 374; 2 Kelly, 137; 8 Ala. 273.)

III. The want of an order continuing the recognizance from February, 1843, till February, 1845, cannot be presumed not to be on file in court below. If the court desire, they can issue a certiorari, *ad informandum conscientiam*, even after writ of error brought. (2 Wend. 478.)

IV. Even if no order be filed, it is but an irregularity; and application should be made to court below to set it aside. Mere irregularities are not ground of error. (17 Wend. 256; 21 id. 19; 9 id. 125; 2 Cowen, 21; 4 id. 533; Laws of 1845, p. 253.)

V. The judgment is entered up under a statute of this state, authorizing summary proceeding. Nothing is required to be filed but the order of Court of Sessions. (Laws of 1844, p. 475, § 8.)

VI. The act of 1844 is constitutional. At common law, a recognizance was an acknowledgment of a former debt upon record; it had the qualities of a judgment, and was binding and conclusive on the party. (4 Denio, 534, 536, 538; 2 Bl. Com. 341; 2 Tidd's Pract. 1083, Phil. ed. 1840; 2 Shep. Touch. by Preston, 354.) Recognizances have been authorized for various purposes; one of which was, to secure payment of money by one person to another. This was allowed by common law, and by statute of Hen. 8, ch. 6. Recognizances taken under Statute, Merchant and Statute Staple were securities for debts acknowledged to be due, and bound lands. (2 Bl. Com. 160; Bacon's Abridgment, Execution, B; Com Dig. Obligation, A; Statute Staple, B; Cootes' Law of Mort. 76, 82; 2 Tidd, 1093, 6; *Hall v. Winchfeld*, Hob. 195; *Edgecomb v. Doe*, Vaughan, 102, 3; *Fanshaw v. Morrison*, 2 Ld. Raymond, 1138.) The sureties in these cases have no reason to complain. They knew the law before they made the engagement, and are bound by their own contract. Summary proceedings of a similar nature, sustained in U. S. courts, and

in several states. (1 Blackf. Rep. 204 ; 5 Howard's Miss. Rep. 434 ; 4 Bibb, 531 ; Laws of U. S. Statutes at Large, vol. 3, p. 593, § 2 ; 4 Wheaton's Rep. 235.) Prior to the constitution of 1821, recognizances could be forfeited in this summary manner. The law of 1844 is similar to that in Greenleaf's Laws. (Laws of N. Y., 1 Greenl. 29, 9, § 5 ; Id. 408, § 4.)

VII. All the difficulties which may be presented as to the evil consequences of such summary proceedings, answered by the power given to Common Pleas of the city of New-York, as a Court of Exchequer, to control these judgments, and "do as in justice they should." (Laws of 1845, p. 250.)

By the Court.—EDWARDS, J.—The first ground of error alleged by the plaintiffs is, that the recognizance upon which the judgment below was founded, describes no offence, and is defective on its face.

In the case of *The People v. Koeber*, (7 Hill, 39,) and of *The People v. Young*, (7 Ib. 44,) it was held by the Supreme Court, that the recognizance should so far state the crime charged, as to show the case to be one over which the officer taking it had jurisdiction. But, subsequently, in *The People v. Kane*, (4 Denio, 530,) it was held by the same court, that a recognizance need not recite the special facts which gave the officer jurisdiction, and that it is enough if he had jurisdiction in cases of that description, and it appears that the condition is to do something to which a party may be legally bound by recognizance ; and the cases above cited were, in this respect, overruled.

In the case of *Champlin v. The People*, (2 Comst. 82,) the rule laid down in *The People v. Kane* was adopted by the Court of Appeals, and is now the settled law of this state. The reason of the rule is, that the entering into the recognizance being the voluntary act of the party, he admits the authority of the magistrate, and acknowledges the regularity of the proceedings in which it is taken ; and, in this respect, the case is distinguishable from one where the liability arises from a proceeding *in invitum*.

The next objection which is taken to the validity of the recognizance is, that the parties to it merely bind themselves that the principal shall keep the peace. But such is not the fact. On the contrary, the condition of the recognizance is, that Gildersleeve, the principal, shall appear at the next Court of the General Sessions of the Peace, to be holden in and for the city and county of New-York, and then and there answer all such matters and things as shall be objected against him, and abide the order of the court, and not depart the said court without leave, and in the mean time shall keep the peace, &c.

Again, it is contended that the recognizance is defective in not stating what particular charge the principal shall answer.

The substance of the undertaking is, that the principal will appear and answer any charge which may be brought against him. The parties entered into the recognizance voluntarily, and they have no right to complain that the condition is too general.

It has been held that where the parties are bound that the princi-

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pal shall appear and answer a particular information, where it is also a part of the condition, as in this case, that the principal shall not depart the court without leave, and afterwards the attorney-general enters a *nolle prosequi* as to that information, and exhibits another upon which the defendant is convicted, and he refuses to appear in court after personal notice, the recognizance is forfeited. (Hawk. P. C. b. 2, ch. 15, § 84; *Queen v. Ridpath*, 10 Mod. 152.)

If then, an obligation to answer a particular charge, when accompanied with the further condition that the principal shall not depart without leave, implies a liability to answer any other charge, it certainly cannot be pretended that it is a defect in the recognizance that it states in express terms what the law would imply without them.

The next question which arises, is as to the legal effect of the recognizance.

It appears to have been taken on the 4th day of February, 1843; and the order of forfeiture was made on the 21st day of February, 1845.

The plaintiffs in error contend that the principal in the recognizance was only bound to appear at the term of the Court of General Sessions which was held next after it was taken. But such has not been the practical construction of a recognizance like the one now in question, and such, as we think, is not its legal effect.

A recognizance is a substitute for the custody of the party; and bail are substituted for the officer whose duty it is to take charge of the party accused. Thus it is laid down by elementary writers, that a man's bail are jailors of his own choosing, who are bound to secure his appearance as effectually, and to put him as much under the power of the court, as if he had been in the custody of the proper officer. If he be in the custody of the proper officer, he cannot be set at liberty, unless discharged by the court, and until then, he is bound to answer any charge which shall be brought against him. And if bail are to be regarded as standing in the same situation as the officer out of whose custody they have taken the accused party, it would seem that they also should have him ready to answer at all times until duly discharged by the court.

It is well known that in the city of New-York a great number of cases are continued from one term of the General Sessions to another, owing to the absence of witnesses, the increase of crime, and other unavoidable causes. The form of recognizance which has been used has always been substantially the same as the one in question; postponements have taken place from term to term; and it has never been supposed that the condition of the recognizance was answered by an appearance merely, at the next term of the court after the recognizance was taken. If such a construction were given to the recognizance, it would be necessary in every case where the party could not be tried, either that he should be taken into custody, or that a new recognizance should be taken. It seems to me that the legal effect of the recognizance in question is that the principal shall appear at the next Court of General Sessions, and answer such charge as shall be brought against him, and be forthcoming before the court

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at all times until discharged. And such a construction I think has been sanctioned by the adjudications of this state. (*The People v. Stager*, 10 Wend. 431; *Champlin v. The People*, ubi sup.)

If I am correct in this view of the case, there was no necessity of any formal continuances from term to term, and the order of forfeiture was regular.

The next ground taken by the plaintiffs in error is, that the statute under which the judgment in this case was entered, is in contravention of the constitution of 1821, which declared that the trial by jury in all cases in which it had been theretofore used, should remain inviolate forever. (Const. 1821, art. 7, § 2.)

A recognizance is an acknowledgment of a debt, and when filed in a court of record, is a matter of record. At common law it bound the lands of the cosutor, and an execution might be issued upon it as upon a judgment. (Tomlin's L. Dic. tit. Recognizance; 2 Saund. 68 a to 70 d. 3; *The People v. Van Eps*, 4 Wend. 387; *The People v. Kane*, 4 Denio, 530.)

Before the year 1818, a recognizance when forfeited was sent by the court in which it was taken to the Court of Exchequer, which was authorized to enforce it by execution. (Laws 1813, p. 401, §§ 1, 6, 9.) In the year 1818 the Courts of Common Pleas of the several counties of this state, were vested with the like powers relative to the collection of forfeited recognizances, as had been before that time vested in the Court of Exchequer. (Laws 1818, p. 307, § 8.) It was not necessary to bring an action upon the recognizance, because there was nothing to be tried.

The recognizance was an acknowledgment of record that a debt was due, and was in its legal effect, a confession of judgment.

About the year 1830, an action of debt was, for the first time, brought in the Supreme Court of this state, founded on a recognizance. The reason why this course was pursued was, that when the powers of the Court of Exchequer, which was a branch of the Supreme Court, were transferred to the several Courts of Common Pleas, an execution issued by one of those courts, could not be sent out of the county. And it was finally provided by statute that when any recognizance to the people of this state should become forfeited, the district attorney should prosecute it by action of debt for the penalty. (2 R. S. 485, § 29.)

In the year 1844 the statute, under which the judgment in this case was entered up, was passed. (Laws 1844, p. 475, § 8.) That statute, which applies only to the city and county of New-York, provides that all recognizances given to answer a charge preferred in a court of criminal jurisdiction, on being forfeited, shall be filed by the district attorney, together with a certified copy of the order of the court forfeiting the same, in the office of the clerk of the said city and county, and that thereupon the clerk shall docket the same in the book kept by him for docketing judgments, transcripts whereof are filed with him as such clerk, as if the same were the transcript of a judgment record for the penalty; and it is further provided that such judgment shall be a lien on real estate, and that it may be collected by execution.

It will be seen that this is substantially the re-establishment of the rule which existed at common law, and under the former statutes of this state, and which existed at the time the constitution of 1821 was adopted, under which the statute in question was passed.

It was said upon the argument that this statute deprives a party of the opportunity of setting up any matter which might be alleged in discharge of his liability. But we do not think that such will be its practical effect. Under the common law rule it frequently occurred that there were matters which had arisen subsequent to the entering into the recognizance, which in equity and justice entitled the conusor to a discharge, and a writ of *audita querela* was resorted to for that purpose. But afterwards, as a more convenient method, the courts were in the habit of granting summary relief upon motion. (Tomlin's L. Dic. 131, tit. *Audita querela*.) And it was expressly provided by the laws of this state that the Court of Exchequer might discharge a recognizance after forfeiture, when justice and equity required it. (Laws 1813, p. 401, § 1.) The same power was conferred upon the courts of Common Pleas of the respective counties when they were substituted in the place of the Court of Exchequer. (Laws 1818, p. 307, § 8.) It is said, however, that no such power is conferred upon any court by the law of 1844. If the judgment entered up under that act is a judgment of the Court of Common Pleas, there is no doubt that by the rules of the common law that court would have the power to give relief on motion. The legislature have not expressly declared that such a judgment shall be a judgment of the Court of Common Pleas, although it would seem that such was their intention: for, after requiring the judgment to be docketed with the county clerk, they provide that an execution may be issued to collect the amount of the recognizance, in the same form as upon a judgment recovered in the court of Common Pleas. And it would seem that the plaintiffs in error so construed the law, for the writ of error is directed to the judges of the Court of Common Pleas, and the return is made by them. Besides, the revised statutes contain a general provision that upon the application of any person whose recognizance shall have become forfeited, or of his surety, the Court of Common Pleas of the county in which such recognizance was taken, may discharge the same upon such terms as to such court shall appear just and equitable. (2 R. S. 486 § 37.)

But even if that court did not possess the power to interfere, there can be no doubt that, in a proper case, a Court of Equity would give relief.

Again, it is contended on the part of the plaintiffs in error, that if the recognizance in this case is to be governed by the act of 1844, which was passed after it was taken, the character of the liability assumed by the plaintiffs will be changed. The question then arises, what was the nature of the plaintiff's liability at the time the recognizance was entered into.

It appears by reference to the recognizance, that the conusors acknowledged a debt to be due, which should be levied of their goods and chattels, lands and tene nents. It was taken before one of the special justices for preserving the peace in the city of New-York, and when re-

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turned and filed, it became an acknowledgment of an indebtedness of record, and like other records it imported absolute verity. (*People v. Kane*, 4 Denio, 530.) At that time it was not a lien upon lands, and an execution could not be issued without a suit; but in such suit, it was not necessary to allege or prove any damage by reason of the breach of the condition. The only thing necessary to be alleged and proved was the breach. (2 R. S. 485, § 29.) If, however, the judgment should be entered up under the provisions of the act of 1844, the order of the court before which the breach would occur, and of which the court itself would have conclusive evidence, would be regarded as sufficient proof of the breach, without the additional formality of the commencement of a suit, and a repetition of the same proof. It is true, that in the former case the party would have an opportunity to set up any matter which would operate as a discharge; but in the latter case he could do the same thing, though in a different manner. The extent and character of the liability would be the same in both cases, but the proceedings would be more summary in one case than in the other.

The statute of 1844 takes away no right, but operates merely in furtherance of the remedy; it furnishes a more summary method of enforcing an existing obligation. (See 1 Kent, 555.)

The judgment of the court below must be affirmed.

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[TRANSFERRED CALENDAR.]

Before DUER, MASON and CAMPBELL, Justices.

CHARLES OTWAY MAYNE v. GEORGE GRISWOLD.

A bill is not multifarious simply because it states facts, which show that the plaintiff may be entitled to two kinds of relief distinct from and inconsistent with each other, unless it also seeks relief in respect of such distinct and separate claims. If the object of the suit is single, and the prayer is only for one kind of relief, the bill is not multifarious.

Neither is a bill defective for want of parties if the plaintiff can obtain the specific relief for which he prays without the addition of other parties, although facts may be stated in the bill, which if made the foundation of the prayer for relief, would render the addition of other parties necessary.

It seems that all the directors or trustees of an incorporated company are not necessary parties to a bill seeking to charge any one of them for a fraudulent breach of trust. The general principle that there can be no contribution between wrong-doers, and that each is liable for all the wrongful acts in which he participated, is well established both at law and in equity.

It does not follow that because a party can obtain in substance the same relief at law as in equity, that a court of equity has no jurisdiction. A mere claim for damages, whether for breach of contract, or for fraud in making it, can in general be recovered only at law; but if the object of the suit be to have the contract rescinded, it will be sustained in equity, although the same amount of money and no other may be recovered in equity as at law.

When a court of equity has once acquired jurisdiction over a particular subject by reason of the supposed defect of remedy at law, that jurisdiction is not lost or taken away by reason of the subsequent greater liberality or enlarged powers of courts of law.

The 51st section of the 4th chapter, of 3d part of the Rev. St. (2 R. S., 301,) which provides that "bills for relief on the ground of fraud shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time," applies

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to bills for relief on the ground of fraud in *all cases*, whether the jurisdiction in equity is concurrent with, or exclusive of the jurisdiction of courts of law.

The 51st section was intended to qualify and restrict the general terms of the 49th section, and to apply a different rule to bills for fraud, whether in cases of concurrent or exclusive jurisdiction, from that which governs in other cases.

A bill filed for relief on the ground of fraud, which shows on its face that the fraud was committed more than six years before the filing of the bill, should not merely state in anticipation of the defence of the statute of limitations, that the fraud was discovered within six years, but show that it could not with reasonable diligence have been discovered sooner.

Where the plaintiff, who resided in England, alleged in his bill, that he was induced to purchase bonds of the Morris Canal and Banking Company, by the false and deceptive statements of the defendant, who was a director of the company, and was therefore under the most sacred obligation to make correct and truthful representations in the premises, which statements were *calculated and intended to mislead, and were artfully contrived* for that purpose; and there was nothing to excite the suspicions of the plaintiff, and the interest on the bonds was regularly paid until a period short of six years before the filing of the bill. Held upon demurrer, that the plaintiff had satisfactorily accounted for the non-discovery of the fraud within six years after it was committed.

THIS was a suit brought in the late Court of Chancery on the 24th of April, 1846, by the plaintiff, as a purchaser of certain sterling bonds issued by the Morris Canal and Banking Company, against the defendant as a director of the company. Its object was to recover from him the amount of such bonds, with interest, on the ground of the defendant's fraudulent representations in relation to the situation and solvency of the company, on the faith of which the plaintiff was induced to make the purchase.

The bill is very long, and it would exceed our limits to give a detailed statement of all its allegations and charges. It will be sufficient for the understanding of the opinion of the court to state, that, as appears by the bill, the Morris Canal and Banking Company, in the beginning of the year 1835, was greatly embarrassed and in a low and failing condition; a large amount of the stock originally subscribed had been forfeited by reason of the non-payment of the instalments, the whole property of the company was under mortgage to W. Willink, of Amsterdam, for \$750,000, and the canal as far as it had been built was entirely unproductive. That on the 5th of March, 1836, an act was passed by the legislature of New-Jersey, authorizing an increase of the capital stock for the purpose of completing the canal to the extent of \$600,000 in shares of \$100 each.

That the defendant was appointed a director by the last mentioned act, and that he being and acting as a director and stockholder, and agent of the company; but covertly and secretly as a principal for his own private and individual benefit, conspired and confederated with various persons, who were also directors and stockholders, and carried into effect divers schemes and measures, the object and tendency of which was to hold out inducements to persons in England, who were not and could not be possessed of the same knowledge or means of knowledge of the situation of the company with themselves, to purchase bonds issued by the company, and thereby to derive pecuniary benefit and advantage to themselves. These various schemes and measures are set forth at length in the bill. They consisted principally in the directors taking to themselves and to their friends all the forfeited stock at par, paying or securing only instalments of ten per cent, and giving their notes payable at long dates for the remaining ninety per cent; and in taking among themselves and their

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friends the whole of the \$600,000 of the new stock, paying or securing in like manner not more than ten per cent of the nominal amount and giving their notes at long dates for the residue, and reserving to themselves the right of taking two hundred dollars of the sterling bonds for every hundred dollars of stock so subscribed on advantageous terms, and also the privilege of surrendering the new stock and cancelling the notes given therefor in case they should be unable to raise the credit of the company; that the defendant had allotted to him 340 shares of this new stock, and after settling for ten per cent of the amount, gave his note for the ninety per cent, or \$30,400 and interest for eighteen months; that he also took 300 shares of such forfeited stock, and other individuals other amounts, and that sterling bonds to a large amount were issued under said agreements to the defendant and other subscribers. That the forfeited shares and the new or increased stock were thus taken up by the defendant and his confederates in order that they might state in a report intended to be made of the condition of the company that the said stock had been taken and paid for at par by *bona fide* subscribers, so that the company might be represented as in possession of a large amount of bills receivable, and in the actual prosecution of an active and profitable banking business, when in fact, such was not the case.

That the defendant was in the year 1836, when these transactions took place, a member of the house of N. L. & G. Griswold, a firm of known respectability and solvency and character in the city of New-York, and well known to the house of Morrison, Cryder & Co. of London; that it was deemed highly important and necessary for the purpose of introducing the said bonds in London, to obtain for them and for the forthcoming report the recommendation of the said house of Morrison, Cryder & Co., which it was supposed could be obtained by the confidence they reposed in the character and solvency of the said N. L. & G. Griswold and of the said George Griswold, the defendant, and by the belief that the defendant or his firm had become the purchaser of the bonds and had advanced the money therefor.

The bill then sets forth certain letters written by the defendant to Morrison, Cryder & Co., in anticipation of the report recommending the bonds and the goodness of the securities, and also referring them to the report then about to be made, as giving a true account of the condition of the company.

The bill then states that on or about the 17th of June, 1836, the confederates with the aid of the defendant got up and adopted a plausible statement of the affairs of the company in the form of a report of the President and Directors and statement annexed thereto, which report and statement were *artfully, wilfully, and in a manner calculated to mislead and deceive*, filled with various false and deceptive statements, some of which were wilfully false, and others untrue, and represented to be true, but of which the defendant and his confederates were ignorant, and others which though literally true, were yet substantially false and deceptive.

The bill then particularizes several of these false and deceptive statements, and among them, those which represented that the capital stock amounting altogether to four million one hundred thousand dollars, had been paid in, when, in fact, a large part of the sum repre-

sented to have been paid in as capital was made up in bills receivable from persons who were quite irresponsible; and charges that a large part of the increased stock of \$800,000 was shortly afterwards surrendered and the notes given therefor cancelled, including the note of defendant for \$30,400. That the report and statement was sent to Morrison, Cryder & Co. with the view of inducing persons in England relying on its truth and fairness to purchase bonds.

That a dividend was shortly after and about the 14th of July, 1836, declared on the stock, by means of which it rose to 102 per cent, and was held at that price when the report arrived in England.

That the plaintiff, in reliance on the report, and also the letters of the defendant to Morrison, Cryder & Co., was induced to purchase five of the said sterling bonds of \$1000 each, for which he gave £4300, which bonds are still held by him and are ready to be produced. That afterwards, and in January, 1837, the company declared another dividend of four per cent; that the interest on the bonds was paid up to January, 1841, since which time no interest had been paid, and that *plaintiff since the day last mentioned had discovered all the before mentioned frauds of which he had before been entirely ignorant.*

The bill also sets forth the sale of the canal under the mortgage to Willink, and the appointment of receivers to the company by an order of the chancellor of New-Jersey.

The bill also claims and insists that the defendant ought to be held responsible for the amount of the note for \$30,400 so given by him for the 340 shares of stock, and which was delivered up to him when he surrendered the stock. The prayer of the bill is "that it may be declared that the plaintiff was induced to purchase the bonds by the aforesaid fraudulent contrivances and representations of the defendant, and that the purchase by the plaintiff of the said bonds may, as between him and the defendant, be declared to be void and be rescinded; and that defendant be decreed to pay him the purchase money with interest and expenses, less the interest received; the plaintiffs offering to re-assign and deliver the bonds to defendant, and for other or further relief."⁶

To this bill the defendant demurred, assigning for causes of demurrer the several matters stated in the points.

W. C. Noyes, for the defendant, made and argued the following points:

I. The bill should have been filed in the names or on behalf and for the benefit of all the parties holding the bonds of the Morris Canal and Banking Company alleged to have been fraudulently issued and purchased upon the faith of the defendant's representations. (*Story's Eq. Pl. § 99*; *Calvert on Parties*, 220; *Crease v. Babcock*, 10 Met. R. 525; *Robinson v. Smith*, 3 Paige, 222.)

II. The bill should have been filed against all the directors of the company who are charged with participating in the fraudulent acts set forth, and there is no sufficient excuse for omitting to make them parties. (*Attorney General v. Leicester*, 7 Beav. 176; *Dan. Ch. Pr. (Am. ed.)* 529; *Perry v. Knott*, 5 Beav. 293; *Kellaway v. Johnson*,

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Id. 319; *Allen v. Honeden*, 6 Id. 148; *Att. Gen. v. Wilson*, 1 Craig & P. 1; *Hill on Trustees*, 315; *Pitt v. Bonner*, 6 London Jurist, 636; *Knatchbull v. Fearnhead*, 3 Mylne & Cr. 124; 2 Fowler's Ex. Pr. 300.)

III. The complainant had a perfect remedy at law, especially as no discovery was asked. The bill states a mere legal claim and seeks to make it of equitable cognizance. (*Gelston v. Hoyt*, 1 Johns. 543; *Jer. Eq.* 290, 383; 1 Story's Eq. § 184; *Russel v. Clark*, 7 Cranch, 89; *Hardwick v. Forbes*, 1 Bibb, 212; *Bradley v. Bosley*, 1 Barb. Ch. R. 125; *Crane v. Bunnell*, 10 Paige, 333; *Ferson v. Sanger*, 5 N. Y. Legal Obs. 43.)

IV. The bill is multifarious, as alleged in the *fourth* special cause of demurrer. (1 Dan. Ch. Pr. (Am. ed.) 384 and notes; Story's Eq. Pl. § 271.)

V. The bill should have been filed by the receivers of the company, at least so far as it seeks to make the defendant liable for the notes, and the excuse for not uniting them in the bill is not sufficient.

VI. So it should have been filed in their name in respect of all the matters embraced in it.

VII. It appears upon the face of the bill that it was not exhibited within six years from the time the alleged causes of complaint accrued, and therefore the statute of limitations has attached. There is no valid excuse for not bringing the suit within the six years. The cause of action accrued the moment the bonds were taken on the faith of the alleged false representations. (*Argall v. Bryant*, 1 Sand. Sup. Ct. R. 98.) More than six years from that time having elapsed, the statute of limitations attached. (2 R. S. 296, § 18; Id. 301, §§ 49, 50, 51; Rev. Notes, part 3, ch. 4, p. 20; *M'Carty v. Camel*, 1 Barb. Ch. R. 466; *Troup v. Smith*, 20 Johns. 33; *Leonard v. Pitney*, 5 Wend. 30; *Allen v. Mille*, 17 Id. 202; *McCrea v. Purmort*, 16 Id. 476; *Ferson v. Sanger*, 5 N. Y. Legal Obs. 43; *Humbert v. Trinity Church*, 7 Paige, 195; S. C. 24 Wend. 487.) In this case the statute of limitations is a good defence upon demurrer. (Story Eq. Pl. §§ 751, 756; *Humbert v. Trinity Church*, 7 Paige, 195; S. C. 24 Wend. 587; 1 Dan. Ch. Pr. (Am. ed. 621 and notes; Esp. on Penal Stat. 78.)

VIII. The receivers of the company, or the company itself, should have been plaintiffs or defendants.

IX. There is no equity in the bill.

C. B. Moore and *F. B. Cutting*, contra, made and argued the following points:

I. The bill sets forth a case entitling the plaintiff to relief, on the ground of fraud. (*Stainbach v. Fernley*, 9 Simons, 556; *Seddon v. Connell*, 10 Id. 58, 79; *Bradley v. Bosley*, 1 Barb. Ch. R. 125, 148.

II. The bill was filed in due time, viz., on the 24th April, 1846, within ten years after the bonds in question were issued, within six years after discovery of the fraud, and promptly after the bonds fell due, and the damage accrued. It is not affected by the statute of limitations. (2 R. S. 1st ed. pp. 296 to 301, §§ 49 to 53, 18, 25, 44; St. Eq. Jur. 908, § 1521, a; *Brickenring v. Churchill*, 3 J. J. Marshall, 15.) Plaintiff is entitled to relief upon principles peculiar to a court of equity. The jurisdiction at law is not concurrent, and there is no difficulty under the statute of limitations. (*Chesterfield v. Jansen*,

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2 Ves. Sen. 155; *Lyon v. Tallmadge*, 14 Johns. 501; 1 St. Eq. Jur. §§ 184-410; 1 Johns. 402, 556; 4 Ib. 118; 7 Ib. 194; 3 Cowen, 537; 4 Ib. 209; 8 Ib. 370; 9 Ib. 309; 1 Hopkins, 48, 75, 494; 1 Paige, 147, 148, 302, 492; 2 Ib. 169, 390, 406; 4 Ib. 94; 7 Ib. 316; 9 Ib. 152; 1 Sandf. 346, 375.)

III. The grounds of demurrer alleged do not apply if the plaintiff's case be sustained on the basis above claimed.

IV. The plaintiff, independently of his case of fraud relating back to his purchase of the bond, is still entitled to a remedy, and to protection against the acts of the defendant, in respect to the dividends and illegal withdrawal of notes without payment.

V. On this last basis it is not necessary to make other fraudulent persons parties. (*Cunningham v. Pell*, 5 Paige, 612; *Wood v. Dunner*, 3 Mason C. O. R., 308; *Craig & Philips*, p. 1: 2 Myl. & Craig, 613; 2 Atkins, 400.) Nor necessary to make the Morris Canal Company or its receivers parties. The Company was broken up, "all its chartered rights" gone. The receivers are officers of another court and state, and non-residents, and have refused to prosecute. They are not amenable to the process of this court. (*Hallett v. Hallett*, 2 Paige, 18, 19.)

By the Court—MASON, Justice.—This case presents several points of interest and importance; some of which are of no ordinary difficulty. They have been elaborately and ably argued by the counsel for the respective parties, and the court has been greatly aided in its judgment by their extensive and learned investigations.

Before proceeding to the main points in controversy, we shall consider the formal objections raised by the demurrer.

First, It is contended by the defendant that the bill is multifarious—that it seeks relief not only by reason of the representations which induced the plaintiff to purchase the bonds of the company, and which are alleged to have been false and fraudulent, but also in regard to the stock note of \$30,400 of the defendant, which it is charged was fraudulently surrendered to him by the board of directors. If such be the necessary construction of the Bill, the objection would in our judgment, be well founded; for the bill would then present two claims not only distinct from, but inconsistent with each other, one in effect disaffirming the purchase of the bonds, and asking that it might be rescinded in consequence of the defendant's deceitful and fraudulent misrepresentations concerning them, and the other, affirming the purchase and insisting that the plaintiff as a purchaser has a right to call on the defendant for their payment out of the amount of the note, which he says belongs to the company and was fraudulently withdrawn from it. A careful perusal of the bill, however, has satisfied us that it is not liable to this objection. It does indeed set forth the facts of the giving of the stock note by the defendant, and of its subsequent surrender to him by the company, but these matters are stated in connexion with several others, only as parts of the fraudulent scheme of the defendant and his associates, in order to give color to the report and statement of the condition of the company by which the plaintiff was induced to purchase the bonds. They are introduced as evidence of a premedi-

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tated design to deceive and defraud. The specific prayer for relief, however, has no reference to the note, but simply prays that it may be declared that the plaintiff was "induced to purchase the said sterling bonds by the aforesaid fraudulent contrivances and practices of the said George Griswold and his confederates, and that such purchase as between the plaintiff and the defendant may be declared void and rescinded, and that the defendant may repay to the plaintiff the purchase money and expenses with interest." It may be true as suggested by the defendant's counsel that the bill contains sufficient allegations respecting the note, which, if proved, would entitle the plaintiff to relief with regard to it under the general prayer. Yet it would not be proper for the court to interpret the bill as necessarily calling for such relief, when the plaintiff himself does not pray for it, and the effect of such interpretation would be to give to the bill that objectionable feature which the pleader has been careful to avoid.

Moreover, if the bill is to be treated as seeking relief with regard to the note, it is defective for want of parties, and the next objection of the defendant that it should have been filed on behalf of all the bond-holders as well as of the plaintiff would undoubtedly be good, for all those who are in a similar situation with the plaintiff, ought to have an opportunity of participating in a fund in which they all have an equal interest. But, as we have seen, the bill merely seeks to make the defendant respond to the plaintiff individually for the fraud which he has committed upon him, by inducing him to purchase the company's bonds. There is no common fund here to be distributed; it does not even appear that there are any others who stand precisely in the same situation with the plaintiff in respect to the bonds issued by the company. And we think that the principle adopted by the late chancellor in *Dart v. Palmer*, (1 Barb. Ch. R. 92,) is applicable to both these objections. He there held that if the complainant in his bill claims specific relief, and then adds a prayer for such further or other relief as may be proper, and the case made by his bill entitles him to the specific relief prayed for, and no other parties are necessary to entitle him to that relief, the court at the hearing ought not to give other or further relief under the general prayer when persons not before the court are necessary parties to such relief, even when the case made by the bill would have entitled the complainant to that relief also against the defendant, if all the proper persons had been made parties. Now, the ground of the demurrer in this case is, that other parties are necessary so far as relates to the stock note of \$30,400, and that no relief can be granted in regard to it unless they are before the court; but if the plaintiff does not ask for relief on that ground, and the frame of his bill is such that in its present state without the addition of other parties he cannot obtain it at the hearing, but he can obtain the specific relief for which he prays, upon what principle is the court called upon to declare that he shall frame his bill with a view to that relief which he does not ask, especially when the alteration would subject the bill to the fatal objection of multifariousness?

Both these objections therefore must be overruled.

The objection that the other directors are not made parties is also untenable.

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We are not called upon by the frame of the bill to decide whether all the directors or trustees of a company are necessary parties to a bill seeking to charge them for a fraudulent breach of trust, although the authorities seem to be decisive that they are not (*Attorney General v. Wilson*, 1 Cr. & Ph. 1. *Cunningham v. Pell*, 5 Paige 612.) The defendant in this case was not in any sense a trustee for the plaintiff, at least until after he purchased the bonds. The fraud complained of was perpetrated, if at all, before their purchase,—it was only in consequence of the purchase, and by its means that the defendant and the other directors were brought into the relations of trustees and cestui que trust, if the ownership of the bonds can be said to have constituted that relation. And the ground on which the defendant is sought to be charged is, not that he violated his duty as trustee for the bondholders, arising out of his position as a director, but that as a man he violated the laws of truth and fair dealing which all are bound to observe in their transactions with each other. It matters not in this point of view that others united with him in these frauds. The general principle that there can be no contribution between wrong doers and that each is liable for all the wrongful acts in which he participated is well established both at law and in equity. (*Attorney General v. Wilson*, 1 Cr. P. 1; and the authorities cited in note to page 28.)

Having disposed of these objections to the frame of the bill, and for want of parties, we come to a more important inquiry, viz: whether a court of equity has jurisdiction of the case.

The defendant insists that the bill states a mere legal claim—while the plaintiff on the other hand contends that it presents a case peculiarly of Equitable cognizance.

We have no doubt that the case made by the bill comes within the principle of *Pasley v. Freeman*—and that the plaintiff upon proof of the facts he has alleged, might, on the authority of that case, recognized as it has been repeatedly in our courts, have recovered in a court of law damages for the injury he had sustained, and that the amount of the bonds with interest and expenses would be the true measure of those damages. This is substantially the relief prayed for in this bill; and we do not think it would have formed any impediment to a recovery in a court of law as was contended by the plaintiff's counsel, that there was no direct communication between himself and the defendant. It would have been sufficient, that he had been deceived by the false representations which the defendant sanctioned and circulated in regard to the situation of the company, with the intent to induce persons on the faith of such representations to purchase the bonds.

This was expressly held in the case of *Allen v. Addington* 7 Wend. 9, affirmed in the Court of Errors, 11 Wend. 374. In that case there was no direct communication between the plaintiff and the defendant. The defendant, however, had written a letter to a third person respecting Baker, who bought the goods of the plaintiff, and that third person represented to the plaintiff that he would trust Baker on Addington's representations, and the court laid down the broad principle, that if a person intending to defraud somebody, gives a general recommendation of credit to an insolvent person, any

one who sustains damage by reason of such recommendation, is entitled to an action for such damage, grounded on the fraud.

But does it follow that because the plaintiff can obtain in substance the same relief at law, as in Equity, therefore this court has no jurisdiction?

This is a question of no small difficulty. The cases are conflicting, and it is, perhaps, impossible to reconcile them all. There were several referred to by the counsel for the defendant, which it was contended conclusively showed that a Court of Equity had no jurisdiction in a case like the present. Among them was the case of *Newham v. May*, 13 Price 749, in which Lord Chief Baron Alexander says, "It is not in every case of fraud that relief is to be administered in a Court of Equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend, ever thought of filing a bill in Equity." And he adds that the case before him was no more than a common case of fraud by means of misrepresentation, raising a dry question of damages; in effect a mere money demand. The case before him was that of a bill filed by a purchaser of real estate, not to rescind a contract on the ground of fraud, but for compensation for the difference in the actual value of the property sold, and the stated value as appearing by the rental, which was represented to be £110 per annum, when in fact it was only £89, and this was a suit, merely to recover damages, the party retaining and affirming the contract. The bill was dismissed, not, however, on the ground of want of jurisdiction, but because it was not supported by the evidence. In *Russell v. Clarke's Exrs.* (9 Cranch, 69) also cited by the defendant's counsel—and which was a bill in equity, seeking to make the defendants responsible for the amount of certain protested bills, on the ground of two letters of guaranty representing that the drawers were perfectly responsible; Chief Justice Marshall remarked, that on the question of fraud the remedy at law was complete, and that if a discovery was not needed, or if the answer disclosed nothing, and the plaintiff supported his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules limiting the jurisdiction of courts required that he should be dismissed from the Court of Chancery, and permitted to assert his rights in a court of law. But the bill in that case was sustained on other grounds. In *Bradley v. Bosley* (1 Barb. Ch. R. 125) also cited on the argument; Chancellor Walworth, in a very elaborate opinion intimates his approbation of the remarks made by the Lord Chief Baron, and Chief Justice Marshall in the cases above quoted, and after referring to some cases decided in the court of appeals in Kentucky, adds, "I am disposed to follow these decisions so far as to hold that a bill in equity, for the purpose of obtaining a compensation in damages merely, to be paid by the defendant personally, cannot be sustained where the defendant makes the objection at the proper time by demurrer or answer that the complainant has a full and perfect remedy by action at law against the defendant." He admits, however, the general rule to be "that in cases of fraud a Court of Equity has jurisdiction, although the party may obtain relief in an action at law." In this case too, the bill was sustained on other grounds.

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The cases in Kentucky referred to by the chancellor were *Hardwick v. Foster*, administrator, 1 Bibb, 212, *Cocke v. Hardin*, Littell's Select Cases, 371, and *Blackwell v. Oldham*, 4 Dana, 195. Upon examination it will be found that they all admit and allege the jurisdiction of the Court of Equity in *setting aside contracts* founded in fraud and misrepresentation—but maintain that if a party who has been defrauded does not seek to rescind a sale, but affirms it, and asks for damages which he has sustained by reason of fraud or imposition practised on him in relation to it, he must seek his damages in a court of law. We apprehend the decision is correctly stated in the Kentucky cases. If your claim is solely for damages, whether for breach of the contract or for fraud in making it, and you seek not to rescind it altogether, you are as a general rule confined to your action at law; but if you seek to have the contract rescinded and declared void, you may have relief in equity, although you may only recover money, and the same amount that you would have recovered at law. In the suit at law the money by way of damages is the principal object; in equity, however, the rescinding of the contract is the principal, and the recovery in money is an incidental, though a necessary consequence.

However this may be, and without undertaking to pronounce positively on this point, we apprehend that there are certain other principles well established which will lead us to a correct conclusion. Thus it is one of the doctrines of a court of equity, that where a plaintiff has a plain, adequate and complete remedy at law, a court of equity generally will not interfere, and for this reason they will not as a general rule sustain a bill for damages merely, whether for breach of contract or for tort, a court of law giving in such case full and adequate relief. The application of this rule, however, must be controlled and governed by another equally well established; that if the jurisdiction originally has properly attached in equity on account of the supposed defect of remedy at law, that jurisdiction is not changed or taken away by the fact that courts of law have subsequently exercised jurisdiction in similar cases. "This has been repeatedly asserted," Mr. Justice Story remarks, (1 St. Eq. Jur. § 641,) 'by courts of equity, and constitutes in some sort the pole star of its jurisdiction.' While then on the one hand courts of equity will not *assume* jurisdiction where there is already a complete and adequate remedy at law, so on the other hand, when their jurisdiction is once established, whether in consequence of the inability or refusal of courts of law to grant relief, or otherwise, they do not lose jurisdiction by reason of the subsequent greater liberality or enlarged powers of courts of law.

The decision of the point before us then depends not *merely* on the question whether the party has an adequate remedy at law, but also on this other question, whether the case falls within one of the acknowledged heads of equity jurisdiction; for if it does, the mere fact that a court of law will now grant the same relief as a court of equity, does not oust the previously well established jurisdiction of the latter. A reference to a few adjudged cases will abundantly confirm this position.

Thus the jurisdiction of chancery was settled and acknowledged in the case of lost bonds. It had been originally assumed because

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courts of law would not entertain a suit on a bond without a *profert*. But when afterwards they allowed a plaintiff to allege in his declaration the loss of his bond as an excuse for not making *profert* and to recover on proving its loss and contents, it was uniformly held that the liberality of courts of law on this head did not deprive chancery of its jurisdiction. (1 St. Eq. Jur. § 81; *Atkinson v. Leonard*, 3 Brown C. C. 218; *Kemp v. Prior*, 7 Ves. 249; *Walmesly v. Child*, 1 Ves. 341; *Toulman v. Price*, 5 Ves. 239.)

So, the jurisdiction of chancery in matters of account has long been well established. It was assumed at a time when the old action of account was the only method of settling accounts at common law. Yet it has frequently been held that the jurisdiction has not been taken away in consequence of the courts of law adopting more simple and expeditious modes of settlement by action on the money counts and references to referees; even in these cases where the oath of the defendant is not required to establish the case. This doctrine was expressly recognised by Chief Justice Kent and Mr. J. Thompson, in *Ludlow v. Simond*, (2 C. C. E. 39-51,) and in the case of *The Corporation of Carlisle v. Wilson*, (13 Ves. 275,) Lord Erskine said, "It cannot be maintained that this court interferes in matters of account only when no remedy can be had at law. The contrary is notorious. The proposition asserted against this bill," he added, "is that this court ought to refuse to interfere by directing an account if an action for money had and received or indebitatus assumpsit can be maintained. That proposition cannot be supported."

In matters of fraud the jurisdiction of the court of chancery is probably coeval with its existence. There is no period in the history of the court when it did not possess it. It is concurrent with courts of law in all cases of fraud except that of wills of real estate, and the court it is said will not lay down rules restrictive of such jurisdiction, but will proceed in every case of fraud upon its own peculiar circumstances. (1 Fonb. b. 1, §8, p. 12.) The objection now made has been frequently made before, and it has been uniformly held, in cases which turned upon the question of jurisdiction, as far as our researches have extended, that the jurisdiction in cases of fraud was not taken away because the parties had an adequate remedy at law. We will mention only two or three cases, and those of a similar character with the one now before us. The first is *Colt v. Wollaston*, 2 P. Wms. 156, decided in 1723, in which the bill was filed to recover back two several sums which the plaintiff had paid to the defendants as managers of a land security and oil patent company for extracting oil out of radishes. The Master of the Rolls observed, "It is no objection that the parties have their remedy at law, and may bring an action for money had and received for the plaintiff's own use, for in cases of fraud the court of equity has a concurrent jurisdiction with the common law, matter of fraud being the great subject of relief here. Accordingly cases of this nature have frequently met with relief in this court. The next case we shall cite is *Green v. Barrett*, 1 Simons, 45, decided in 1826. That was a bill to recover back deposits paid by a subscriber to a joint stock company where the project was a bubble. The bill was demurred to, and one ground of demurrer was that the only remedy of the plaintiff was by an action for money had and received; but the Vice-chancellor, after remarking on

the facts, said that the only question was whether a bill in equity would hold or whether the plaintiff must have recourse to law; and as it appeared the whole scheme was a mere snare to entrap the unwary, on the authority of *Colt v. Wallaston*, he overruled the demurrer. We shall look in vain for any case in England for the 108 years intervening between *Colt v. Wallaston* and *Green v. Barrett*, in the least affecting the authority of these cases. *Green v. Barrett* was followed in 1828 by *Blain v. Agar*, 2 Sim. R. 289, which was similar in its general features and was similarly decideh. Indeed, so well was the jurisdiction considered to be established in England, that in the late case of *Seddon v. Connell*, decided in 1840, (10 Sim. 58,) and which in some respects resembled the case before us, although the bill was demurred to, yet the objection we are now considering was not even raised.

All the cases which we have cited under this head were cases of deceitful and fraudulent representations, where the only relief sought was, as in the present, the rescinding of the contract and the repayment of the money paid by the deceived and defrauded parties, as a consequence of declaring the contract void; and it is worthy of notice that until the case of *Pasley v. Freeman*, decided in 1789, it never had been solemnly decided by a court of law, that an action could be maintained for fraudulent and deceitful representations of the kind mentioned in that case. Even then Mr. Justice Grose dissented from the opinion of the other judges, and Lord Erskine in advertng to that case in *Clifford v. Brooke*, (13 Ves. 131,) as late as 1806, stated that a considerable difference of opinion at that time prevailed upon it, and that many of the most correct judgments appeared to have been surprised, Lord Eldon, it is well known, always maintained that *Pasley v. Freeman* was wrongly decided, and that a court of equity alone had jurisdiction in such cases. *Evans v. Bicknell*, 6 Ves. 186.)

Since then, before the decision of *Pasley v. Freeman*, courts of law did not entertain jurisdiction in cases like the present, and the only remedy was in a court of equity; it lies upon the party objecting to the jurisdiction of this court to show *when* and *how* it was deprived of that jurisdiction, which it formerly unquestionably possessed. Until that is done we shall feel bound to decide that the original jurisdiction of chancery in cases of fraud remained when this bill was filed in its pristine vigor.

It was also urged as a reason for turning the plaintiff over to a court of law, that he had waived an answer under oath. This would be a sufficient reason, if the relief asked for depended on the discovery under oath. There are many cases in which a party's title to relief in a court of chancery depends on such discovery, and in which, when the discovery is waived, the whole foundation of equitable jurisdiction is taken away. Cases of fraud, however, do not depend on the discovery sought, but belong, as we have seen, to the original jurisdiction of the court.

The next and most important question is, whether the claim is barred by the statute of limitations. If the plaintiff had no right to come into a court of chancery at all, then the claim he now makes is clearly barred by the statute. If he can sustain himself in this court, then, whether the statute is a bar or not, depends upon the construction to

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be given to the 49th, 50th and 51st section of the 4th chapter of the third part of the Revised Statutes. They are as follows:

"§ 49. Whenever there is a concurrent jurisdiction in the courts of common law, and in courts of equity, of any cause of action, the provisions of this title limiting a time for the commencement of a suit for such cause of action, in a court of common law, shall apply to all suits hereafter to be brought for the same cause, in the court of chancery.

"§ 50. But the last section shall not extend to suits over the subject matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject matter is not cognizable in courts of common law.

"§ 51. Bills for relief on the ground of fraud, shall be filed within six years after the discovery, by the agrieved party, of the facts constituting such fraud, and not after that time.

We have seen that the jurisdiction in the case before us is concurrent in Courts of Law and Equity, and if the 49th section governs, then the statute of limitations is a bar to this suit. If, however, the 51st section applies to cases of concurrent as well as of exclusive equitable jurisdiction, the result may be different; and the question is, did the Legislature mean by the 51st section to except from the operation of the 49th section all bills for relief in cases of fraud, or did they mean to confine that section to those bills in which courts of equity had exclusive jurisdiction?

Prior to the passage of this act, there was no statute of limitations which in terms applied to courts of equity. But the principles adopted by those courts on this subject were well settled. In cases of concurrent jurisdiction with courts of law they held themselves to be bound by the statutes of limitation. They acted not merely by analogy but in obedience to them. They would, nevertheless, interfere in cases of alleged fraud, to prevent the statute from running, where to allow it to run would be inequitable or unjust; and this upon an acknowledged principle on which courts of equity give relief, viz: to prevent an advantage gained at law from being used against conscience.

Thus in a case of fraud where the jurisdiction was concurrent, if the statute of limitations was a bar to the suit at law, although under ordinary circumstances, it would also be a bar in equity, yet if the fraud had not been discovered until more than six years after its commission, equity would not allow the statutory bar to be set up if the suit was commenced within six years after the discovery. while the fraud was concealed, said Lord Redesdale in *Hovenden v. Lord Annesley*, (2 Sch. & Lef. 634) the statute of limitations ought not in conscience to run. See also *Bond v. Hopkins* 1 ib. 418 431; *Blannerhasset v. Day*, 2 Ball and B. 129; 2, Story Eq., Jur. § 1521, and 1521 a. This was expressly admitted to be the rule in chancery by our Supreme Court in *Troup v. Smith*, 20 John, 33, and by the Court of Errors in *Murray v. Coster*, ib. 533; and it is so consonant with the first principles of justice, that it has been adopted *ex necessitate* in those states where the court of chancery is not established. Thus in Massachusetts the plaintiff may avoid the bar of the statute by replying that the cause of action had been fraudulently concealed from his knowledge by the defendant, and that it was not discovered by him until six years before the commencement of the

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action. *First Mass. Turnpike Co. v. Field*, 3 Mass. 201, *Homer v. Fish*, 1 Pick, 435. See also *Pennock v. Freeman*, 1 Watts 401; *Jones v. Conoway*, 4 Yeates 109. It is not necessary to allow such a replication where a plaintiff can have relief in Chancery, and therefore it was held in this state, in *Troup v. Smith*, cited above, that such a replication was not good.

The question now recurs, what did the Legislature mean when they enacted the several sections quoted above. Did they intend to declare that in these cases of fraud, in which courts of equity have peculiar and exclusive jurisdiction, the statute should not begin to run until after the discovery of the fraud, but in those cases in which the courts of law and equity had concurrent jurisdiction, the statute should begin to run from the commission of the fraud, though it might not be discovered until six years afterwards? Considering the large class of cases of this kind in which the jurisdiction of the two courts is concurrent, such an event would be a great innovation upon established law,—it would create a distinction between the two kind of causes in equity where none ought to be made, and would afford a protection to fraud which did not before exist, and which in our judgment, never ought to exist.

We cannot suppose that such was the intention of the Legislature. If it had been they could easily have said so; or if they had omitted the 51st section altogether, the construction contended for by the defendant's counsel, would have followed as a necessary consequence; for section 49 applies in terms to all suits to be thereafter brought in the Court of Chancery, where there should be a concurrent remedy at law, and section 50 expressly excepts suits, over the subject matter of which courts of equity have peculiar and exclusive jurisdiction. Why then was the 51st section added without specifying that the bills for relief intended by it were those only over the subject matter of which courts of equity had peculiar and exclusive jurisdiction? Manifestly, because the section was intended to qualify and restrict the general terms of section 49, and to apply a different rule to bills for fraud, whether they were cases of concurrent or exclusive jurisdiction from that adopted in all other cases, and thus to declare or enact by statute. the rules which we have seen had been adopted by the courts on this subject.

This appears also from the notes of the revisers (3 R. S. 2d ed. p. 705,) in which they refer to the cases before cited from 20 Johns. and also to 2 Ball & Beatty, 129, 2 Sch. & Lef. 636, and state it to be their intention to enact as part of the statute law, the rules laid down in those cases; and as the legislature adopted the sections in the form proposed by the revisers, it is natural to infer, in the absence of all evidence to the contrary, that they adopted also their views.

We have met with only one case in our books involving the construction of the sections of the statutes we have been considering; the case of *Bertine v. Varian*, 1 Edwards' Ch. R. 343, where the Vice-Chancellor referred to this statute; and after deciding that the case before him was one in which a court of law has concurrent jurisdiction with a court of equity, he observes with regard to the allegation that there was fraud and concealment on the part of the defendants, that such facts whenever they exist, are sufficient to prevent the operation of the statute in the view of a court of equity—

thus giving a construction to the statute then before him in accordance with the views herein above expressed.

But it is objected that admitting the case comes within the 51st section, yet the bill is defective in not stating why the fraud was not discovered sooner, and it was contended that as the bill upon its face showed a fraud committed more than six years before, the plaintiff, if he wished to get rid of the bar of the statute should not merely state by way of anticipation, the fact of the discovery of the fraud within six years, but show that it could not with reasonable diligence have been discovered sooner. The correctness of this position was not seriously questioned by the counsel for the plaintiff, but he insisted that the allegations of the bill were sufficient to satisfy the most stringent application of the rule contended for.

It appears from the bill that the plaintiff resided in England. He was therefore unable personally to make himself acquainted with the true state of the case. The fraudulent representations were put forth by the directors of a monied institution with a large capital, who were entrusted by the legislature of one of the states with a most important and expensive public work, requiring not only a large amount of funds, but integrity and enterprise of no ordinary character. The report and statement by which the plaintiff was deceived were, it is alleged, artfully and purposely filled by these directors, of whom the defendant was one, and with his aid, concurrence and sanction, with fraudulent and deceptive statements, calculated and intended to mislead—some of which though literally true, were yet substantially false and deceptive by reason of the manner of stating them, and the suppression of important facts which ought to have been disclosed. The particulars of these statements are set forth, and also the points in which they are alleged to have been false and fraudulent. The bill then alleges that in the year 1836, the company declared a dividend with the same fraudulent purpose, when they had made no profits or earnings out of which it could have legitimately been declared, by means of which and of the statements beforementioned, the stock advanced to one hundred and two per cent; that the plaintiff purchased upon the faith of this report and statement, and of the dividend and the letter of the defendant set out in the bill; that after his purchase of the bonds in 1836, the interest on them was regularly paid by the company until January, 1841, since which time no interest had been paid; that the company with the like fraudulent purpose had declared another dividend in January, 1837, without having made any earnings or profits upon which to declare the same, and that the frauds above specified were not discovered by the plaintiff until after the first of January, 1841, and within six years next before the filing of the bill.

Now, it appears to us, that the plaintiff had a right to rely upon the statements put forth by such authority as true, especially when there was not only no circumstance calculated to excite suspicion, but the statements were *artfully contrived* to prevent any suspicion being excited of their untruth; and he had a right to continue his confidence in the soundness of the institution when a subsequent dividend was declared, and as long as the interest on the bonds was punctually paid. We think then that the defendant cannot object that the plaintiff did not sooner discover the frauds which he and his associ-

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ates are alleged to have been so careful to conceal. There was in fact nothing to put him on inquiry till the default in the payment of the interest.

The Plaintiff, moreover, was in England; the Company was in this country. He did not come or send here to invest in these bonds—they sent to him in a foreign country. The report and statement were made for the avowed purpose of giving him, in common with other capitalists in England, that information which, by reason of their distance, they could not learn from personal observation; and the defendant and his associates were therefore under the most sacred obligations to deal fairly and honestly, and the plaintiff was justified in placing the most implicit confidence in the statements made under such circumstances.

But admitting it to have been his duty to have made earlier inquiries, of whom was he to inquire? Of the defendant? He had his letters—or of him and the other directors? He had their official report and statement. Was it to be expected that they would give the lie to these formal and carefully prepared documents, and confess their own fraud, especially while the company was still in good credit? Could he have examined the books of the company? As a bond holder before the maturity of the bond, and while the interest was regularly paid, it is at least doubtful whether he could have demanded an inspection of the books, any more than the holder of a note of an individual can, before its maturity and while the maker is in good credit, pry into his private transactions. He may require to be informed of his true situation before he give him credit, but having done so, he must remain satisfied until an actual insolvency happens.

We think it manifest from these considerations that the plaintiff has sufficiently anticipated in his bill the defence of the statute of limitations, and that the facts stated fully and satisfactorily account for his not having discovered the fraud charged until within six years before the commencement of the suit.

The result at which we have arrived then is, that this demurrer cannot be sustained, but the defendant must answer.

We trust that none of our remarks will be construed as expressing any opinion on the truth or falsity of the charges made by the plaintiff. We have considered the bill merely as a pleading admitted by the demurrer to be true for the sake of the argument. And we have proceeded on the same assumption, with the same view and object, viz: to determine whether the bill on its face can be maintained.

The counsel for the defendant has properly interposed this demurrer. He was perfectly justified, even though all the material charges of the bill can be shown to be untrue, in presenting the very grave questions raised by it to the consideration of the court, and endeavoring to relieve his client from the expense and vexation necessarily attending the defence of a suit of this kind. All that we have decided is, that the plaintiff has made out a *prima facie* case. And that on the supposition that the statements in his bill are true, he had a right to bring the suit in this form, and to support his allegations by proof. Beyond this we have not intended, and it would be manifestly improper for us to express any opinion.

The demurrer is overruled, and the defendant must answer the bill, and pay the costs of the demurrer in forty days.

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FRAUDULENT ASSIGNMENTS.

THE decision in the case of *Griffin v. Barney*, (2 Comstock R., 365,) so far as it sustains the doctrine that "an assignment by an insolvent debtor, of his estate, is fraudulent and void, where by the terms of the deed, the trustees are authorized to sell on credit," was received by the profession generally with some degree of surprise, as it announced the adoption of a more rigorous doctrine in respect to this class of instruments, than had ever before been established. It evinced the determination of the learned judge who pronounced it, to maintain in the Court of Appeals, those principles of uncompromising hostility to insolvent assignments, which had distinguished his judicial career in the Supreme Court, and which, in the full conviction of their correctness, he had striven to support and vindicate, notwithstanding the opposition which they encountered in the Court of Errors, and even the positive reversal by that tribunal of some of the judgments in which they were embodied. The "spirited and witty comments"* sometimes elicited in the court of last resort by the peculiar doctrines of Judge Bronson on this subject, were at the date of *Griffin v. Barney*, no longer to be feared, as that court had been blotted from existence by the new constitution of 1846, and its judicial Yorickisms, transmitted to posterity on the pages of Johnson, Cowen, Wendell, Hill and Denio, had acquired a mournful interest from their association with a state of things dear to every "laudator temporis acti." Judge Bronson, too, had been elected to the Court of Appeals, and being no longer controlled by the shackles of an authority, which, during its continuance had failed to inspire him with respect, he now breathed more freely in the new judicial atmosphere to which he had been elevated.

"Largior hic campos æther et lumine vestit
Purpureo; solemque suum, sua sidera norant."

It was not to be expected that Judge Bronson, having now "ample scope and verge enough" for declaring the law, according to his own unbiassed judgment, should consider himself bound by the spirit of

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such decisions of the Court of Errors as that of *Smith & Hoe v. Ack-er*, (23 Wend. 653,) which, while a judge of the Supreme Court, he had refused to recognise as binding, because, as appears from his opinion in *Butler v. Van Wyck*, (1 Hill 462) he considered "it no law at all." We find him accordingly holding in *Griffin v. Barney*, that an assignment for the benefit of creditors, in which the assignee is empowered to sell on credit, is void on the ground that it is a conveyance to hinder creditors. Now, although it is true, that every assignment made *with intent* to delay creditors, is void; it does not follow that every assignment which incidentally produces this result, is also to be regarded as invalid. Were this the law, scarcely an assignment by an insolvent could be sustained, as the almost uniform result of these instruments, is to protract the sale of the assigned property beyond the period at which it might have been sold under legal process. It has never yet in any reported adjudication been held sufficient cause for removing an assignee, that he held portions of the assigned property at a period ulterior to the time when a sale might have been effected under execution; and yet if the principle now under discussion is to be pushed to its ultimate legitimate consequences, it is clear that such delay would amount to culpable negligence. For if the grant of a power which has the effect of delaying creditors, is of itself sufficient to invalidate an assignment, it is clear that the delay, in the abstract, is wrongful, without reference to its extent, or the motive that produced it. The question then arises, must the assignee sell the property immediately after taking possession of it, without regard to the state of the market, the season of the year, or any other considerations affecting the probable result? Where, by selling on a short credit, to a purchaser of undoubted responsibility, he can best subserve the interests of the *cestuis que trust*, is there any inflexible rule of law which prevents him from doing so? Supposing the property in his charge to consist of unfinished work, must it be forthwith sold at all hazards, when a little wise delay and a small expenditure would largely enhance its value? Or take the case of railroad or other stock, which owing to the operation of temporary causes, has been much depreciated, but is steadily rising in the market as those causes disappear, would it be illegal in the assignee to forbear selling at an enormous loss? It may be said, that in cases such as these, the creditors are to be consulted, and their directions must govern the assignee. But if the creditors are not unanimous in desiring a sale for cash, how must the assignee proceed? Must he sell for cash against the opinion of the majority, or may he sell on credit with the assent of the majority; and which majority is to rule, that of number or value? It is clear, however, from Judge Bronson's opinion, that he considered the deed void on its face. If so, it cannot be helped by any matter or averment deors the instrument itself, and therefore the wishes or directions of the majority of the creditors could not aid the defect. The question of fraud in fact, independent of what appears in the deed, is not even mooted, but the deed is declared void on its face without resort to any other evidence to ascertain the intent of the assignor.

The court unquestionably had the right of deciding, *as a question*

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of fact, whether the assignment in *Griffin v. Barney* (originally in chancery) was void as intended to hinder, delay or defraud creditors; but whether, as intimated in that case, the grant of a power to sell on credit is conclusive evidence of fraud—whether it is fraudulent in law—may perhaps be a point admitting of some discussion. It will hardly be contended, however, that the decision of a court or judge on a question of fact, is to be regarded as a precedent for the decision of the same point by a jury, even though it may be supported by the same amount of evidence. *Griffin v. Barney* was originally before the chancellor, whose duty it was to decide, from the evidence before him, all the questions of fact arising on the pleadings. But neither his decision, nor that of the Court of Appeals, on questions of this class, can determine that in all future cases of a similar character, coming before a jury (as such cases do, under the code,) the same amount of evidence shall be held as conclusively establishing the same result. The judgment of the court on a question of fact has no more authority as regards future cases where the same question may arise, than the verdict of a jury has over subsequent trials involving a parallel state of circumstances. The questions of fact arising in equity cases, which were formerly decided by the court, must now be passed upon by a jury; and to instruct a jury in any case, that the phraseology of a deed is conclusive evidence of fraud, is really to preclude them from the exercise of all judgment on the question, and to merge their functions in those of the court. Wherever, therefore, a deed of assignment is not void on its face, as containing a trust for the benefit of the assignor, the question of intent to defraud, hinder or delay creditors, must be submitted to the jury, to be decided, like any other question, by the preponderance of evidence. (2 R. S. 3d ed. p. 198, § 4; Code, § 253.)

The decision which forms the subject of these remarks has been alluded to throughout, as the decision of Judge Bronson, and not of the court, and so far as regards that portion of it which has been more particularly discussed, the designation thus given appears to be correct. In support of this view, we may refer to the statement of the reporter in the preface to his second volume, and also to the abstract at the head of the case. On the fourth page of the preface the mode of preparing the judgments of the Court of Appeals, is thus explained:

"It is the custom of the judges, (I am speaking of the Court of Appeals,) at the commencement of each term, to go into consultation upon the cases argued at the previous term. The opinions which have been written during the vacation are then read, and in the thorough discussions which take place, what has been written is quite likely to undergo more or less modification."

It is presumed that the opinion in *Griffin v. Barney*, after having been prepared by Judge Bronson, was found on consultation among the members of the court, to contain propositions which they thought unnecessary to adopt, and for which they were not desirous of being held responsible; and while they coincided with the judge in the result at which he arrived on the chief point in the case, the invalidity of the deed, owing to the trust reserved for the benefit of the assign-

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or—they forebore discussing other questions which were not essential to a just determination of the case. Thus we find (2 Comstock, 365,) that while the first two propositions contained in the marginal abstract, are stated as the opinion of the court, the two latter, one of which embraces the point now under discussion, are referred to as “per Bronson, J.” It is true that the language of the opinion contains no intimation that all its parts are not of equal authority, but the circumstance is readily explained by reference to the reporter’s account of the mode of preparing the judgments of the court which has just been quoted. It is not to be supposed that the reporter would have made the distinction adverted to, in his abstract of the case, unless it was authorized by some communication from the bench. The court having declared the deed invalid on account of the illegal trust which it contained, seemed to have thought it unnecessary to give the *coup de grace* to a dead enemy, or thrice to slay the slain merely by way of warning and example to the living.

The reporter of the Court of Appeals has not informed his readers of the rules which he prescribes to himself in the publication of the decisions of that tribunal, where differences of opinion exist among its members. In some cases the dissenting opinions are published at length, in others, they are merely referred to, and in some there is reason to believe, all mention of them is entirely omitted. As an instance of the latter class, the case of *Ruckman v. Pitcher*, (1 Comstock, 392,) may be alluded to. The decision of Mr. Justice Jones there appears as the unanimous opinion of the court, but on turning to the Legal Observer, for June, 1850, page 177, we find that Judge Bronson, (Judges Jewett and Johnson concurring,) delivered an adverse opinion, condemning, with honest indignation, in language as strong and vehement as is consistent with judicial dignity, the monstrous violation of natural justice and common morality by which the plaintiff’s claim was sustained. So in the case of *The Cayuga Bank v. Worden*, (1 Comstock, 418,) no notice is taken of the dissenting opinion of Judge Gray, which was read in the consultation room. (See Legal Obs. for August, 1850, p. 272.) A comparison of the 1st and 2d volumes of Comstock’s Reports will show, that while in the former the court differed in more than one third of the reported cases of appeals upon judgments, in the latter they had made such progress in unanimity that the proportion of cases in which they dissented was only about one-seventh.

The simple question whether the grant of power to an assignee to sell on credit by an insolvent assignor necessarily vitiates the assignment, appears therefore to be still an open question; indeed, being under the statute a question of fact, (*Vance v. Phillips*, 6 Hill, 433,) it does not admit of a uniform solution. The judge may charge that such a grant is *conclusive* evidence of fraud, and the court may set aside the verdict of the jury should they disregard this instruction, but there is no disguising the conclusion that such a course is tantamount to annulling the power of the jury to pass upon a question of fact.

This discussion cannot be more appropriately brought to a conclusion, than by quoting the language of Judge Bronson in *Butler v.*

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Van Wyck, (1 Hill, 459.) “*Statutes* are usually made to operate prospectively, and do not disturb rights already acquired. But when the law is changed by judicial decisions, especially in a question of such widely extended influence as that relating to conveyances of personal property among a commercial people, it is impossible to foresee all the evil consequences which may follow. Such decisions act upon the past as well as on the future, and no man can feel secure in a community where that which is settled law to-day may be overthrown to-morrow, in a mode which has an *ex post facto* operation, and thus either legalizes acts which were originally void, or makes things vicious which were faultless when they happened. It is going quite too far to say, that a single decision of any court is absolutely conclusive as a precedent,” &c., &c.

Whether assignments by a debtor in failing circumstances, ought, in any event, to be tolerated, is a point which it is not intended here to argue; but surely so long as a law exists which allows them, it is neither wise nor just to surround it with limitations and restrictions that render it in effect inoperative and unavailable. If it has outlived or failed to answer the object of its creation, far better repeal it at once, rather than allow it to prolong a mere nominal existence, deprived of every attribute that can render it beneficial—“a mockery, a delusion and a snare.”

In the Court of Appeals.

[*State of New-York.*]

Before the Honorable GREENE C. BRONSON, presiding Judge, and Judges JEWETT, GARDINER, RUGGLES, HURLBUT, HARRIS, and PRATT.

CHARLES OAKLEY v. JOHN L. ASPINWALL AND OTHERS.

(*October Term, 1850.*)

Relationship to either party disqualifies a judge from sitting in any court.

The express consent of the parties does not obviate the objection; but the judgment will be void, whether rendered by the related judge alone, or by a court consisting of several, of whom he sits as one, though there be a quorum without him.

The objection is not removed by the fact that the party related to the judge is indemnified against his liability, where such party is liable to execution upon the judgment.

In the Court of Appeals, where an interested or related judge has sat, the judgment will be vacated on motion.

The constitution of 1846 does not require that all the eight judges of the Court of Appeals should sit to make a quorum, and the statute declaring six a quorum is constitutional.

It seems that where the sole judge of a court is related to one of the parties, and the law has made no provision for the case, still the related judge cannot sit, but such a case must wait for legislative provision.

THE respondent moved in March term, upon petition and affidavits to vacate the judgment of reversal entered in this cause in December last, upon the following state of facts: The appeal was taken from the judgment of the Superior Court of the city of New York in fa-

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vor of the plaintiff, upon a bill of exceptions taken on the trial by the defendants.

The action was debt upon a bond given by the defendants, one as agent and the others as sureties of John W. Baker of Trinidad de Cuba, to discharge an attachment taken out by the plaintiff against said Baker and John Young as non-resident debtors. The demand sworn to was stated to be upon a judgment rendered in the Supreme Court of this state; and the condition of the bond was to pay so much as was justly due the plaintiff by Young and Baker at the time of the attachment, on account of any debt claimed and sworn to as an attaching creditor. On the trial, the record of the judgment showed that no process was served upon Baker and he did not appear, and the plaintiff gave evidence to prove that Baker was jointly liable as a partner with Young for the demand recovered. The defendants excepted to the ruling of the judge,

That the demand proved was such as sworn to, and also,

That the evidence of joint liability was sufficient to be submitted to a jury.

The appeal was moved for argument at Norwich in July last, when Judge Bronson was absent and all the other judges present. Judge Strong stated that he was related to the appellants Aspinwalls within the 7th degree and declined to sit; whereupon the counsel for the appellant objected to going on with only six judges as his chances of getting five for reversal would be greater when Judge Bronson should be present. The respondent's counsel protested against postponement to increase the appellants' chances of success, when six, a lawful quorum, were present without Judge Strong; and upon the presiding Judge intimating that there was good cause to postpone, the counsel offered to waive the objection to Judge Strong sitting, rather than submit to the delay. Judge Strong refused to sit, and the cause was put over for the term.

At Buffalo, when the cause was about to be reached again, Judge Ruggles was absent, and Judge Strong stated in presence of the counsel of both parties, that as the defendants were indemnified, if both counsel would say so in open court he would consent to sit. The counsel of the respondent agreed to do so, as he states, because the counsel for the appellants had threatened to postpone the argument again and in order to avoid the delay, but the counsel for the appellants denied such threat or any intention to ask a postponement. When the cause was called, both counsel assented that Judge Strong should sit, and admitted that Mr. Baker would save them harmless. Judge Strong thereupon took the papers and sat till the adjournment, about an hour. The argument continued all the next day, but Judge Strong was absent during the whole or greater part of the forenoon session of near five hours. The affidavits were conflicting as to his being in at all during the session, one witness swearing that it was announced in the morning that he was sick, and two that he was not in during the session, but Judge Strong and the defendant's counsel thinking he was in part of the time.

In December, J. Shankland delivered an opinion for affirmance in which J. Gardner concurred. Judges Bronson, Jewett, Cady and

Hoyt held that the demand of the plaintiff was not on, or did not arise on the judgment as against Baker, and therefore the plaintiff had not proved such a demand as sworn to on attachment, and were therefore for reversal. Judge Strong did not concur in this, but held that there was not sufficient evidence of the joint liability of Baker, and that there should have been a nonsuit. No other judge concurred in this, but the five last named voted to reverse, and judgment was entered accordingly.

Judge Strong was second cousin to the Aspinwalls, by consanguinity.

H. P. Hastings, of counsel for the respondent, maintained the following amongst other positions:

1. That the court had no right to reverse, on points arising upon a bill of exceptions, without the concurrence of five judges, that some *one point* had been decided *wrong*, or some *one exception* was well taken; and that therefore the judgment should be vacated and a re-argument ordered. That it was manifestly absurd for this court to say to the court below, "We are of opinion you have erred upon this bill of exceptions, but don't *know* upon *which* exception. *That you will find out yourselves, the next time,*" which would be *all the majority* voting to reverse *could* say; and that the court below would be bound to decide *all the points* as they did before, their own opinion not being overruled. Code of Procedure, §§ 11 and 14.

2. That the absence of Judge Strong from the bench during a large portion of the argument, after it was announced that he was absent on account of illness, rendered him incompetent to take part in the decision; and that his participation made the judgment void; as without his vote there would have been no such judgment. (2 R. S. 275, § 2, and Note of Revisers; 24 Wend. 529, 30, 562, 3.)

That, whether it did so or not, it fully excused the counsel in disregarding his consent that Judge Strong *should sit*, as that was given in the expectation that he *would sit* and hear the argument; and not that he would give a casting vote for reversal, without hearing it.

3. That the relationship of Judge Strong to the appellants rendered him *incompetent* to sit as a judge in the case, with or *without consent*, and that his participation or sitting as a judge in *any* manner made the judgment void. (21 Wend. 64; 1 Hill 654; 8 Johns. R. 409; 13 id. 318; 21 Pick. 106; 7 Watts, 228.)

As to the consent given by himself it amounted to nothing *in law*, but might be claimed to be binding upon him in point of honor. In answer to this he had only to say, that if he had unwisely and inadvertently consented to place his client's rights in the hands of an incompetent judge, and his case had been lost by it, he should, *if there had been nothing else to excuse it*, feel bound, at the instance of his client, either to make the motion to vacate the judgment himself, or abandon the case and let other counsel do it. In this case, however, he felt *fully justified in every point of view* in making the motion himself, and supporting it with all the humble ability he possessed; and

leave his course to the judgment of the court and the profession, on the grounds; first, that the consent was forced from him by the most unwarrantable precedent established at Norwich, of delaying the cause for the absence of a judge, *when a legal quorum were present, to increase the appellant's chances of success*, and which he had good reason to believe would be followed at Buffalo, if Judge Strong did not sit; second, that the reversal by a concurrence of minorities was unfair and illegal; and third, that the judge, did *not sit and hear the argument in pursuance of the consent, and ought not to have voted, if otherwise competent*.

F. B. Cutting, of counsel for appellants, insisted that absence during part of the argument, did not disqualify a judge to decide; that the relationship did not disqualify, because the appellants were indemnified, and if it did, that the consent was binding, and that the judgment given by five judges was valid, no matter on what grounds they voted.

HURLBUT, J.—The appellants Aspinwall were defendants in the judgment from which this appeal was taken, they were personally liable to pay it, as between them and the respondent, and execution to enforce it might have gone against their property. They may have been indemnified, but that did not exempt them from primary liability on the judgment, and hence, did not divest them entirely of interest in the case. They were then parties to the suit, and having such an interest as to give rise to the objection now taken to Judge Strong's participation in the decision of the cause, because of consanguinity to them, and the question is, what effect had such participation upon the judgment pronounced by this court?

The first idea in the administration of justice, is, that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle, that any departure from it shocks their common sense and sentiment of justice.

It was long ago reported on the authority of *Holt* that the Mayor of *Hertford* was laid by the heels for sitting in judgment in a cause where he himself was lessor of the plaintiff in ejectment, although he by the charter was sole judge of the court. (1 Salk. 396.) No information has reached us at this day, tending to show that the treatment which the mayor received on this occasion, was deemed too severe by his cotemporaries, although his apology, to wit—"that he was the sole judge of the court"—has been held by some modern judges to excuse them for determining upon matters and cases in which their relations were parties or were interested. But it seems to me far better, that causes as to which the sole judge of a court is presumed to be biassed in favor of one of the parties, should remain undetermined until the legislature should provide an appropriate tribunal for their decision, than that the principle which demands complete impartiality in a judge should ever be violated. The urgency of a particular case is not so much to be regarded as the elevation and honor of courts of justice, whose dignity and purity constitute the main pillar of the state.

Partiality and bias are presumed from the relationship or consanguinity of a judge to the party. This presumption is conclusive, and disqualifies the judge. A justice of the peace who was a son-in-law of the plaintiff insisted on retaining jurisdiction of a cause, notwithstanding it was objected against by defendant; and the Supreme Court held that this was of itself evidence that the trial was not fair and impartial, and reversed the judgment. (*Bellows, &c. v. Pearson*, 19 Johns. R. 172.) In the case of *The Washington Insurance Co. v. Peierce, et al.* (1 Hopkins' Ch. R. 1,) Chancellor Sandford declared that it is a maxim of every code in every country that no man should be a judge in his own cause; but it is not left to his discretion or to his own sense of decency, whether he shall act or not; that when his own rights are in question, he has no authority to determine the case—that so well was this principle understood that in every court consisting of more judges than one, the judge who is a party in a suit takes no part in the proceedings or decision of the cause, and that he knew of no example of the contrary conduct in this country.

The provisions of our revised statutes on this subject profess to be merely declaratory of universal principles of law, which make no distinction between the case of interest and that of relationship, both operating equally to disqualify a judge. Hence the statute declares, that "No judge of any court can sit as such in any cause to which he is a party, or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties." (2 Rev. Stat. 275, § 2, Revisers' Notes; 3 R. S. 694.

After so plain a prohibition, can any thing more be necessary to prevent a judge from retaining his seat in the case specified? He is first excluded by the moral sense of all mankind; the common law next denies him the right to sit; and then the revisers of our law declared that they intended to embody this universal sentiment in the form of a statutory prohibition, and so they placed this explicit provision before the legislature, who adopted it without alteration, and enacted it as the law. The exclusion wrought by it, is as complete, as is, in the nature of the case possible. The judge is removed from the cause and from the bench; or if he will occupy the latter, it must be only as an idle spectator and not as a judge. He cannot sit as such. The spirit and the language of the law are against it. Having disqualified him as a judge, the statute further declares that he can neither decide nor take part in the decision of the cause as to which he is divested of the judicial function. Nor ought he to wait to be put in mind of his disability, but should himself suggest it and withdraw, as the judge with great propriety attempted to do in the present case. He cannot sit, says the statute. It is a legal impossibility, and so the courts have held it. (*Edwards v. Russell*, 20 Wend. R. 63; *Foot v. Morgan*, 1 Hill, R. 654.

The law applies as well to the members of this court as to any other; or, if there be any difference, it is rather in favor of its more stringent application to the judges of a court of last resort, as well because of its greater dignity and importance as a tribunal of justice,

as that there is no mode of redress appointed for the injuries which its biased decisions may occasion. The law and the reasons which uphold it apply to the judges of every court in the state, from the lowest to the highest.

It was, however, urged at the bar, that although the judge was wanting in authority to sit and take part in the decision of this cause, yet that having done so, at the solicitation of the respondents' counsel, such consent warranted the judge in acting, and is an answer to this motion.

But where no jurisdiction exists by law, it cannot be conferred by consent; especially against the prohibiting of a law which was not designed merely for the protection of the party to a suit, but for the general interests of justice. (*Low v. Rice*, 8 J. R. 409; *Clayton v. Per Dun*, 13 J. R. 218; *Edwards v. Russell*, 21 Wend. R. 63; 21 Pick. R. 101.)

It is the design of the law to maintain the purity and impartiality of the courts, and to ensure for their decisions, the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases, and it is important in that respect that their decisions should be free from all bias.

After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach, and the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind.

The party who desired it might be permitted to take the hazard of a biased decision, if he alone were to suffer for his folly; but the state cannot endure the scandal and reproach which would be visited upon its judiciary in consequence.

Although the party consent, he will invariably murmur if he do not gain his cause, and the very man who induced the judge to act, when he should have forbore, will be the first to arraign his decision as biased and unjust.

If we needed an illustration of this, the attitude which the counsel for the moving party in this case assumed towards the court, the strain of argument which he addressed to it, and the impression which it was calculated to make upon an audience, are enough to show that whatever a party may consent to do, the state cannot afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions, made in disregard of the prohibitions of the law under consideration.

The constitution of 1846 has been referred to, but so far as I can perceive, it is silent on this subject. It declares that there shall be a Court of Appeals composed of eight judges; but does not define its jurisdiction, nor enter into the details of its organization; and in the absence of an express declaration to that effect, it is not to be intended that the framers of the constitution designed to abrogate the great and salutary rule which disqualifies a judge from acting in the cases referred to. There is so much reason and fitness in the rule, that nothing short of a solemn and express declaration of the sover-

eign will, ought to be deemed sufficient to abrogate it. In the absence of such an expression in the constitution, it seems proper to hold that the jurisdiction conferred on the judges of this court in general terms, is subject to an implied exception in favor of the operation of the rule by which they would be excluded from sitting in cases where they may be interested or related to the parties. Such an exception is implied under the most comprehensive grant of jurisdiction by statute. (4 Coke R. 118 ; 6 Wingate's Maxims, 170.) And I perceive no reason why it should not be, under a constitutional grant of power.

The views expressed by Judge Bronson in *Pearce v. Delemater*, (1 Com. R. 1,) in reference to the right of a judge of this court to sit in the review of cases, where he has taken part in the decisions in the court below, do not, I think, necessarily conflict with the doctrine I have endeavored to maintain, as there may be reason to believe that the framers of the new constitution designed to change the law on that subject, and as was said in that case, "there was nothing in the nature of the thing, which made it improper for a judge to sit in review upon his own judgments."

But the present case is different ; the disqualification under consideration exists at common law, and is necessary in order to preserve the moral dignity of courts, and the due administration of justice ; and since it was not embraced in the former constitution of the state, the silence of the new constitution on the subject, cannot be urged to show that it was the design to abrogate it.

But it may be said that this court consists of eight judges—that a less number cannot constitute it, and therefore, from necessity its members must sit in all cases.

The constitution declares that it shall be "composed of eight judges," and omits to provide that a less number may constitute the court. The absence of such customary provision, has led some to suppose that the framers of the constitution designed to fix the number of judges inflexibly at eight, although it would be extremely difficult to assign any reason for their having done so.

I think it is rather to be presumed that the design was to create an efficient court, one capable in view of the accidents of life, of assembling and conducting business with reasonable facility, and that no unnecessary obstacle was designedly presented in its very constitution, to the convenient discharge of its duties. It is, I think, safe to conclude, that the omission to declare that a less number than eight might constitute the court, was either accidental, or it was designed that the legislature should determine what number should make a quorum. I incline to adopt the latter view, which seems to derive support from § 25 of Art. 6, of the constitution, which directed that the legislature at its first session after the adoption of the constitution should *provide for the organization of the court*.

The constitution did not prepare the court for service. It declared that such a tribunal should exist, provided from what number and classes of judges it should be constituted, enjoined upon the legislature the duty of organizing it, and left its jurisdiction and course of procedure to be defined by law.

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Legislative action was necessary, before the court could be said to exist for any practical purpose. Without this it could not have assembled and given audience to suitors, and it owes its being not more to the constitution than to the act of 1847, and subsequent statutes which fashioned and endowed it with form and legal vitality.

The constitution called for the court, and presented the materials of which it might be formed, and the legislature under the express authority of the constitution organized it. The authority to organize implied a right to ordain whatever was necessary or fit in order to form the court and give it efficient action, without going counter to the constitution, which is silent on the subject of a quorum. The legislature then having before them the materials for composing the court, and rejected none of it, were at liberty I think, to dispense with the attendance of so many of the judges, as in their wisdom might be deemed expedient in order to guard against accident, render the court capable of efficient action, and to avoid the necessity of any judges sitting when interested or related to a party to a suit. This was the first step to be taken in the act of organization, and most necessary to its success; and I am inclined to concede to the legislature complete authority over this subject to the extent assumed by the statutes referred to.

It being provided by law that six members of the court shall constitute a quorum, a judge who is interested or related to a party to a suit cannot be required to act from necessity, unless where at least three of the judges may be so circumstanced—a case not likely to occur.

It appearing then that Judge S. could neither lawfully hear, nor take part in the decision of this cause, but that he did both, I am of the opinion that no proper determination has been made upon this appeal—that the judgment thus inadvertently entered, and the remittitur ought to be vacated, and that the cause ought to be re-argued.

Judges GARDINER, RUGGLES, and PRATT concurred.

Judges BRONSON, JEWETT, and HARRIS dissented.

Judge TAYLOR, who was not present at the argument, took no part.

Hereupon, Chief Justice BRONSON insisted that eight judges, and no less, were a quorum by the constitution, and consequently four, though a majority of the seven who heard the motion, could not grant it, not being a quorum. A vote was then taken upon the question, whether the motion was granted by the vote of four to three; upon which Gardiner, Ruggles, Hurlbut, Pratt, and Harris voted in the affirmative, and Bronson and Jewett in the negative.

An order was thereupon entered vacating the judgment of reversal, directing a re-argument.

N. Y. Supreme Court—Plant v. The Long Island Railroad Company.

N. Y. Supreme Court.

(General Term—October, 1850.)

Before EDMONDS, EDWARDS and MITCHELL, Justices.

EDWARD PLANT v. THE LONG ISLAND RAILROAD COMPANY.

To allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunnelling, is not a misappropriation of it, provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and re-passage. The temporary inconvenience to which the adjoining proprietors are exposed, while the work of excavation and tunnelling is going on, is *damnum absque injuria*, and will not entitle a party to damages. Where the land of individuals is taken for a street in a city and compensation is made for it, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes as custom and the public good require that a street should be appropriated, without making further compensation.

THE facts sufficiently appear in the opinion.

A. H. Dana, for the plaintiff.

H. F. Clark, for the defendant.

By the Court—EDWARDS, J.—This action was brought to recover damages for the injury which the plaintiff alleges that he has sustained by reason of the construction of a tunnel by the defendants, through Atlantic-street in the city of Brooklyn. The bill of exceptions shows that the plaintiff was the lessee of a messuage and tenement situated upon said street, for the term of three years, and that during the continuance of his lease, the defendants excavated the street for the purpose of constructing the tunnel, and that they were engaged in the work of excavation and construction for several months. It further appears that during this time the carriage way was laid open, and the passage way upon the side-walk was rendered narrow although it was sufficiently wide for persons to pass and re-pass. It also appears that the tenement possessed by the plaintiff was occupied as a retail dry goods store; and witnesses were called to show that he was injured in his business, while the work was in progress. Upon this state of facts, the defendants moved for a nonsuit, which was denied by the circuit judge. The defendants then read their charter of incorporation, and the charter of the city of Brooklyn, and also read an ordinance of the common council of the city of Brooklyn, authorizing the defendants to construct the tunnel in question. The circuit judge then stated that this ordinance was a justification of the defendants, and a complete defence to the action, unless the plaintiff claimed to recover on the ground that the work was done negligently, unskillfully, or improperly, and said that he would so charge the jury. To this decision the plaintiff's counsel excepted, and declined going to the jury on the question of negligence, or unskillfulness, and submitted to a nonsuit, with leave

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to move to set the same aside. The form of the action, was trespass on the case.

It will be observed that the damages claimed are not for any permanent injury ; and it is not pretended that the street was impaired or obstructed as a highway beyond the time necessary for the completion of the excavation. The simple question then before us is, whether the common council of the city of Brooklyn had the power to pass the ordinance under which the defendants acted.

The primary object of a street is to furnish a free passage to the public. It is for that end chiefly, that the soil is appropriated to the public use. Such being the case, there seems to be no good reason why the use should be confined to the natural surface of the soil, and why a new surface may not be created for the same purpose, either by tunnelling or excavation. If such new surface can be created, it must follow that it can be used in any way in which the original surface could be legally used ; and it has been held at a general term of this court in the case of *Drake v. The Hudson River Railroad Company*, that the laying of a railroad track upon a street in a city is not such an exclusive appropriation of the street as obstructs or impairs the right of passage and re-passage, and, in reference to the convenience of the public, is legal.

But that is not the question which arises here ; for in this case, the tunnel is appropriated exclusively to the use of the defendants, and the question is, whether the common council of the city of Brooklyn had the right to authorize such an appropriation.

Although a highway in the country is, as a general rule, needed for no other purpose than as a place of passage and re-passage, yet the case is different as to a street in a populous commercial city. There are many uses to which streets in large cities are usually appropriated for the promotion of health, trade and commerce, and the public convenience, such as the construction of drains and sewers, and the laying of water and gas pipes. These are servitudes which are highly beneficial to the public, and in no way injurious to the private rights of individuals. They do not interfere with the surface of the street. They in no manner whatever impair the right of free passage and re-passage, neither are they injurious to the adjoining property ; on the contrary, they are either directly or indirectly advantageous. There can be no doubt that a railroad in a city is calculated to promote trade and commerce, and it is equally clear that the public convenience is promoted by its being constructed in such a manner that it can in no way interfere with the ordinary modes of conveyance. If such be the case, we can see no good reason why it is a misappropriation of the street to allow it to be tunneled for a railroad, any more than it is to allow it to be excavated for sewers, or water or gas pipes.

It is not denied, that to a certain extent the common council of the city of Brooklyn have the legislative control over its public streets. And they are expressly authorized to make and establish all such ordinances, by-laws and public regulations, not contrary to the constitution and laws of the state, as may be proper for the good government and order of the said city and its inhabitants, and the regula-

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tion of the trade and commerce of the city. (Laws 1834, ch. 92, p. 100, § 27.)

It is under this general power that they may create or authorize those urban servitudes to which the streets in large cities are usually appropriated, and if the work in question is beneficial to trade and commerce, it would seem to be within the province of the common council to authorize its construction.

It is said, however, that this power is qualified by that provision of the constitution, which requires that compensation shall be made to the owner of private property taken for public use.

As far as we are aware, it has not been customary in this state, where the streets of cities have been appropriated to legitimate public uses, for the promotion of health, trade or commerce to make compensation to the owners of adjoining lands. The reason of this undoubtedly is, that the streets are laid out for such purposes, as well as for highways; and when the property of individuals is taken for streets, and the city makes compensation for the property so taken, it purchases and pays for the right to appropriate the land to all such legitimate uses, as custom and the public good require that a street should be appropriated.

But, again suppose that no compensation has been made to the owners of the adjoining lands, and no consent has been obtained from them, how can the plaintiff take advantage of it in this suit? He does not claim damages for trespass upon land owned or possessed by him, nor for an injury done to the soil in front of his lot. He claims consequential damages for injury alleged to have been done to his business, arising from the obstruction of the street along the whole extent of the excavation. If this be an injury, it is one which a person not living upon the street might have sustained equally with the plaintiff.

There were two cases cited upon the argument, which it was contended, sustained the claim set up by the plaintiff. (*Fletcher v. The Auburn and Syracuse Railroad*, 25 Wend. 462; *Trustees of the Presbyterian Society of Waterloo v. The Auburn and Rochester Railroad Co.*, 3 Hill, 567.)

In the first of these cases the declaration alleged that the defendant had caused an embankment of the height of four feet to be made upon and across a street near the messuage and garden of the plaintiff, and that by reason thereof he could not have and enjoy his right of free and unobstructed passage and re-passage unto and upon the street to and from his garden and messuage, and was deprived of the use of the street, and besides that his messuage was, by reason of the embankment, frequently inundated with water, &c. The defendants justified under their charter of incorporation, which authorized them, whenever it should be necessary, to intersect or cross any road or highway between the villages of Auburn and Syracuse, to construct their railroad across the same, but that they should restore the road or highway thus intersected to its former state, or in a sufficient manner not to have impaired its usefulness. They then averred the necessity of intersecting the street, and that they restored it to its former state in a sufficient manner not to have impaired its useful-

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ness. To this plea the plaintiff demurred, and the court held that the meaning of the provision of the charter upon which the defendant relied, was "that the road was to be restored to its former state, or in a manner not to impair its usefulness; that is, in such a manner that the public might continue to enjoy it as before." But they held that if when thus restored, the plaintiff was deprived by reason thereof, of any right which he previously possessed, or was subjected to any injury, he was entitled to damages.

If the plaintiff in the case before us, had claimed damages because the defendants, after they had finished the construction of the tunnel, had placed the street in such a condition that his use of it was permanently obstructed by a change of the grade, and his message impaired by the flow of water caused by such permanent change, the case would have been analagous to the one cited.

In the other case relied upon by the plaintiff, the defendants constructed their railroad upon the highway in front of the plaintiff's premises, without his permission, and without making compensation to him, and the plaintiff sued them in trespass. The court there held, that the plaintiff was the owner of the soil of the highway, subject only to the public easement, and that the defendants could not use the highway for a railroad track, without making compensation. But this case also differs from the one before us. In the first place, the action was trespass for injury to the soil of the plaintiff. The soil which was appropriated by the defendants was a highway in the country. If the suit had been brought by a tenant of the premises not adjoining the railroad, for consequential damages accruing from the temporary obstruction of the highway, while the defendants were laying their track, the ruling of the court would probably have been different, particularly if it had not appeared that the railroad was made without the consent of, or compensation to the owner.

The conclusion, then, to which we have arrived, is, that the defendants, from aught that appears in the bill of exceptions, were, as regards the public at large, authorized to construct the tunnel in question, and that if the defendant has been injured by the temporary inconvenience to which he, as well as others, may have been exposed, during the continuance of the work, there being no complaint of negligence or unskillfulness, it is a case of *damnum absque injuria*, and the plaintiff is not entitled to damages.

The motion for a new trial is denied.

 THE NEW CODE IN THE ISLE OF MAN.

A Manx paper exclaims mournfully, "How mortifying and melancholly to compare the triumphant system of the State of New-York with the rust-covered proceedings on this little Island!" Strange enough, the attorney-general of Manx is a native of this city—Chas. Richard Ogden, Esq.—*Parker's Journal, New-York.*

Court of Sessions.

[City and County of New-York.]

Before the Honorable F. A. TALLMADGE, Recorder.

IN THE MATTER OF WILLIAM C. CLARK.

HABEAS CORPUS—CHARGE OF PERJURY—MATERIALITY OF AVERMENT—CORRUPT DESIGN.

THE facts and circumstances of the case sufficiently appear in the opinion of the court.

J. Van Bueren and O. Hoffman, for W. C. Clark.

John M'Keon, District Attorney, for the people.

TALLMADGE, Recorder.—The defendant, Clark, is in custody by virtue of a warrant issued by Jeremiah Lathrop, Esq., a Police Justice of the city of New York, on the complaint of Francis P. Sage and Ferdinand Suydam, Jr. The warrant charges that the said Clark, in a matter pending before the Hon. William Mitchell, one of the judges of the Supreme Court, did commit wilful and corrupt perjury in swearing to the truth of certain allegations by him made in said matter, and which allegations were pertinent to the issue therein pending; that said allegations were false, and that "said Clark had no good reason to believe them to be true," "all which, with other allegations made by Clark, the said Suydam and Sage declare upon oath to be wilful and corrupt perjury, and in a matter affecting the issue of said suit or action."

The general character of the charges contained in the warrant, and forming the foundation or justification for his arrest renders it necessary to examine the affidavits of Suydam & Sage, to ascertain the precise character of the affidavit made by Clark in his application to Judge Mitchell, and upon which is based the charge of wilful and corrupt perjury as well as the character and form of the denial of Suydam & Sage of the truth of those charges. It will be sufficient for the purposes of this application to state, that Clark averred, under oath, before Judge Mitchell, and for the purpose of procuring a warrant to arrest Ferdinand Suydam, Jr., Francis P. Sage, and Samuel Suydam, pursuant to the provisions of the act entitled "An act to abolish imprisonment for debt and to punish fraudulent debtors," and the acts amending the same, that the said Suydam, Sage & Suydam had assigned, removed and disposed of a large part of their property, with the intent to defraud their creditors, that they had caused shipments of flour to a large amount to be made in the name of a man by the name of Body, to conceal their interest in said flour, that the said Body was irresponsible, and that he procured large advances on said shipments, and that said advances were di-

rected to be paid over to said Suydam, Sage & Suydam. He further charges that similar shipments were made in the name of Body, by them, subsequent to their failure, with the like intent to defraud their creditors.

The complainants Suydam & Sage, in their affidavits, recite the declarations made by Clark, but do not deny the facts as set forth by Clark, but only so far as coupled with their intent to defraud.

These allegations and qualified denials constitute the ground or basis on which the magistrate issued his warrant for the arrest of Clark for perjury.

The statute of this state declares that "every person who shall wilfully and corruptly swear, testify, or affirm falsely, to any material matter upon any oath, &c., legally administered, &c., shall be adjudged guilty of perjury upon conviction," &c. (2 R. S., 681.)

To constitute the criminal offence, therefore, with which Clark is charged and is held in custody, three requisites are necessary, viz :—

1st. The oath or affirmation must be false.

2d. It must relate to a matter which is material to the issues pending before Judge Mitchell.

3d. Such false oath or affirmation must be wilful and corrupt.

The oath or affidavit made by Clark, is declared by the oaths of Suydam & Sage, in the particulars referred to by them in their affidavits, to be untrue, and it is also averred by them and it is not denied or questioned by the accused, that the facts set forth in his affidavit were material to the issue pending before Judge Mitchell.

The materiality, as well as falsity, of the oath of Clark are claimed to have been fully established by oaths of Suydam & Sage, and that the corrupt intent is legally inferable from the circumstances that have been developed by the affidavits of the parties.

This assumption brings me necessarily into a more critical examination of the precise character of the affidavits of the parties, and of the act of 1831, under the provisions of which the power of the judge was invoked.

The affidavit of Clark, made August 20th, 1850, states among other things, that Suydam, Sage & Co., merchants, are indebted to the firm of which he is a partner in the sum of \$6000, besides interest on contract, that they have commenced a suit thereon, &c., and that being a contract, they cannot be arrested or imprisoned on any civil process, &c.; he further says that Suydam, Sage & Co. stopped payment on or about the 6th or 7th of August, inst., being largely indebted; that previous to their failure they assigned, removed and disposed of a large part of their property with the intent to defraud their creditors; that such fraudulent proceeding continued subsequent to their failure.

That a few weeks previous to their failure, and shortly afterwards, one J. E. Body shipped large amounts of flour to foreign ports on his own account, upon which he obtained large advances, which were paid over to Suydam, Sage & Co.

That said Body is irresponsible and possessed of little or no means; that said flour so shipped was the property of Suydam, Sage & Co., and that the employment of the agency of said Body by them, was for the purpose of concealing their interest in said property, and to

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avoid their creditors. He charges that Suydam, Sage & Co., retain an interest in said property in whole or part.

He further charges that Suydam, Sage & Co. are about to make further shipments and concealments of their property, with like intent to defraud their creditors.

On the 23d of August, F. P. Sage and Ferdinand Suydam, Jr., made affidavits that the statements made in the affidavit of Clark, so far as relate to their having, from time to time, assigned, removed, and disposed of a large part of their property, *with the intent to defraud their creditors*, is utterly untrue; that the statements so made by him, "that the said pretended ownership thereof of the said Body is a plan adopted by them to conceal their interest in said property to avoid their creditors, and that they are about to make further shipments and concealments, of their property *with an intent to defraud their creditors*," are, and each of them is, utterly untrue.

In other words, admitting the truth of the asseveration of Clark, that Body was employed as a medium for others disposing of a large amount of flour for Suydam, Sage & Co., that he procured large advances on the shipment of the same—that he paid over those advances to Suydam, Sage & Co., and that he was an irresponsible person—yet, it is asserted that this peculiar mode of transacting their business was not adopted with the *intent to defraud their creditors*.

What averments contained in the affidavit of Clark, then, constitute the ground on which Judge Mitchell must have issued the warrant for the arrest of Suydam, Sage & Co.?

The act to abolish imprisonment for debt and to punish fraudulent debtors, provides that no warrant to arrest a defendant shall issue, unless satisfactory evidence be adduced to the officer by the *affidavit of the plaintiff*, or of some other person, that there is a debt on demand due from the defendant, specifying the *nature* and the *amount* thereof, &c., and *establishing* one or more of the following particulars, viz:

That he has assigned, removed or disposed of his property with the intent to defraud his creditors.

By an examination of this statute, three things are necessary to be established by *satisfactory evidence*:

1st. That a debt exceeding \$100 is due the plaintiff.

2d. That from the *nature* of it, the defendant could not be arrested or imprisoned.

3d. That defendant has removed, assigned or disposed of his property with intent to defraud his creditors.

What is meant by "establishing certain facts by satisfactory evidence?"

It certainly cannot mean by "evidence which is to be adduced before the judge," the mere deductions of the mind arising from reasoning upon a particular state of facts or assertions of the belief of the party, but they are the *facts* and *circumstances* themselves, to be presented, and the judge is to deduce his own conclusions from these facts and circumstances. And then the statute proceeds to say, "*upon proof* being made to the *satisfaction* of the officer, he shall issue his warrant."

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Can it be maintained that the mere *declared opinion* or positive asseverance of a creditor, "that a defendant has assigned, removed, or disposed of his property, with intent to defraud, &c.," justifies the severe process of incarceration of his debtors under the statute?

No court of justice can receive as evidence of the existence of a fact, a mere opinion, deduced from reasoning from facts, except in cases of experts or medical opinions,—and I am confirmed in this view of the meaning of this statute from the phraseology adopted in the 7th section of the same act. (Laws of 1831, 376.)

"On the appearance of the person so arrested before the officer issuing such warrant, he may controvert the *facts* and circumstances, not opinions and belief on which such warrant was issued"—and the complainant may examine such defendant on oath touching any fact or circumstance material, &c., and so, if after hearing the testimony, &c., "the officer is satisfied that the *allegations* of the complainant are substantiated—that is, that the allegations or charge of fraud are confirmed by facts on evidence; and that the defendant has done any one of the *acts specified*, &c.," he shall commit the party. (11 Johns. R. 177; 5 Hill, 608; 6 Hill, 429.)

I infer, therefore, from this view of the statute that the charge made by Clark, that Suydam, Sage & Co., did certain acts without specifying those acts, with the intent to defraud their creditors, is a mere allegation, harmless in itself, and forms no sufficient ground for granting the warrant, and that no warrant should issue unless facts and circumstances are presented establishing and sustaining the truth of such charges—in other words, affording evidence of the truth to the mind and judgment of the officer.

But it is said that an indictment for perjury may lie upon an expression of belief only; there can be no doubt that such is the law, but it can only be sustained when the party swears he believes the existence of a fact, when it can be proved that he cannot, from the nature of things, believe any such thing. I am sustained in this view of the case by Roscoe, p. 814 and 677.

There is no assertion or pretence in the affidavit of Suydam and Sage, that Clark did not believe what he had sworn to, although the magistrate so inserted it in his warrant against Clark, without the authority of the affidavits of Suydam and Sage.

The *materiality* of the averment made by Clark (which is contradicted by Suydam & Sage) to the issue before Judge Mitchell, is at least very questionable.

But it must be apparent to every person that to constitute the offence with which Clark is charged, another essential ingredient is necessary; to wit, a *corrupt design*.

This corrupt design may be inferred from circumstances—circumstances which satisfy the judgment that the party making the oath knew, when asseverating to the truth of the facts, that they did not exist or had not occurred. In this consists the enormity of the crime of perjury and the wilfulness and corruption attendant upon its consummation, characterizes it as among the highest offences known to our criminal code. (7 Wharton, 477.)

We should not look to the warrant of the magistrate alone to ascertain whether Clark is chargeable with such design, but to the affi-

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davits of the parties, and the object to be obtained on the one side and its defeat on the other.

The object designed to be effected by Clark in making his affidavit before Judge Mitchell was to procure the arrest of Suydam and Sage as fraudulent debtors, he being a creditor ;⁴ to effect such an object, and to procure a warrant of arrest from the judge, it was necessary to satisfy the mind of such judge that such fraudulent intent existed as would justify the strong and summary interposition of the law,—and this interposition could not be invoked by the mere representation of the belief or even the positive oath of the party of the existence of such fraudulent intent on the part of the debtor, but such *facts* and *circumstances* are required to be presented, as well to satisfy the mind and judgment of the officer of the existence of such fraudulent intent ; the statute provides that a denial and successful disproval of these *facts* and *circumstances* will vitiate the warrant of arrest.

The *wilfulness* and *corruption* so essential in the constitution of the crime of perjury, consist in the allegation of the fraudulent intent on the part of Suydam, Sage & Co., evidenced by the commission of certain acts which are set forth in the affidavit of Clark, and which remain, as far as I can discover, uncontradicted.

The relation of these facts and circumstances appeared to have satisfied the mind of Judge Mitchell of the truth of the inference as drawn by Clark from the facts and circumstances ; and I shall be unwilling to characterize an act as wilful and corrupt that seems to have secured the confidence and induced the action of that distinguished judge.

Had Suydam, Sage & Co. denied the shipment of large amounts of flour through Body, on their account and for their use ; of his procuring large advances and paying the same over to them, or of his utter irresponsibility, the case might assume an entirely different aspect ; but I cannot bring my mind from this view of the case to the conclusion that Clark in drawing this inference from these facts, which are not denied by Suydam & Sage, has committed any offence for which he should be detained in custody.

There has been no change made by the complaints that the facts as set forth in the affidavit of Clark, were untrue as stated by him, or that the inference that he drew from them was wilfully and corruptly made ; and I am not prepared to infer either from the facts before me, and I therefore discharge him from arrest.

DEATH OF ALEX. GARDINER, ESQ., CLERK OF U. S. CIRCUIT COURT.

It is our painful duty to announce the demise of Alexander Gardiner, Esq., Clerk of the U. S. Circuit Court, and United States Commissioner, which melancholly event took place at his residence, in Houston-street, on Tuesday evening, at 7 o'clock, after five days' illness of bilious cholice, at the early age of 34 years. Mr. Gardiner held the above office since 1845, where, by the urbanity of his manner, and the ability with which he discharged his official duties, he earned the esteem and admiration of all who knew him.

City Court, Brooklyn.

[State of New-York.]

Before Hon. JOHN GREENWOOD, City Judge.

HENRY J. CULLEN *against* MARIA H. MILLER, JOSEPH DEAN, and JOHN SKILMAN.

ACTION ON ADMINISTRATRIX'S BOND.

On an appeal from a surrogate's decree, if sufficient is done to constitute, in judgment of law, an approval and filing of the bond required by law, the appeal is effectual, although the surrogate may not suppose that he has officially approved the bond. There is no valid distinction between an *official* approval of a bond and an actual approval; and the not marking it as approved is no ground for such distinction, if it was in fact approved.

If a surrogate retains the appeal and bond, and puts them in a drawer in his office, marked as left by an attorney on a certain day, this is a sufficient filing to comply with the statute. What a *filing* is, defined.

An appeal, if not void, must be got rid of by a motion to dismiss it.

An order giving leave to prosecute an administrator's bond does not affect an appeal if valid; and although obtained on notice, it has no greater effect.

After a decree in a surrogate's court, a notice to a former proctor will not bind a party.

THE facts sufficiently appear in the opinion of the court.

N. F. Waring, for plaintiff.

J. P. Rolfe, for defendants.

GREENWOOD J.—This is an action on an administratrix's bond. The principal and controlling question in the case is, whether the appeal from the surrogate's decree, directing the payment by the administratrix of a sum of money to the plaintiff is regular. The statute provides (2 R. S. 700, §§ 108, 109,) that no such appeal shall be effectual, until a bond be filed with the surrogate, with two sufficient sureties to be approved by him in an amount, and with a condition there specified, and that every such appeal when perfected, except in certain cases within the class of which the present does not fall, shall suspend all proceedings on the order appealed from until such appeal be determined, or until the court to which the appeal shall have been made, shall authorize proceedings thereon. By the 117th section (Id. 700) the filing such appeal and perfecting the same by giving a bond shall be deemed sufficient notice of such appeal to the adverse party.

From the testimony of the surrogate who was examined as a witness in this cause, and the documentary evidence given, the following facts were elicited: The appeal and bond, with affidavits of justification of the sureties endorsed upon the latter, were presented to the surrogate within the time required by law, by Mr. Rolfe one of the solicitors who brought the appeal. Mr. Spooner had acted as the proctor for the administratrix before the surrogate, and after the

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making of the decree and before the appeal, had told the surrogate that he brought no appeal; and subsequently to the appeal wrote to the surrogate signing himself as proctor for the administratrix, that not having seen his client he was not prepared to give notice of appeal, and inquiring when the time for appealing expired. When Mr. Rolfe called on the surrogate with the papers, the latter informed him that Mr. Spooner was the attorney in the case. Mr. Rolfe replied that he and his copartner were employed to bring the appeal. The surrogate stated that he should require his fees for making the return, as the papers were voluminous, to which Mr. Rolfe answered that there would be no difficulty about that. The surrogate being asked on his examination, whether his attention was called to the approval of the sufficiency of the sureties at the time the bond was left with him, answered that he thought something was said about it, that he had some recollection of asking Mr. Rolfe about Mr. Russell, one of the sureties whom he did not know. He thought Mr. Rolfe said he was abundantly responsible, and *that what he said satisfied him of it, and that he told Mr. Rolfe that as the sureties had justified, he, the surrogate, should not object to the want of sufficient sureties, or to that effect, and that Mr. Rolfe went out with that impression, leaving the papers with him.*

The bond was not however marked, as approved, according to the surrogate's uniform practice in such cases, but it, and the appeal were endorsed in pencil by the surrogate, "Left with surrogate by J. P. Rolfe, March 29, 1847," and were placed by him in a private drawer in the surrogate's office, and not in a place where they would have been put if he had considered them filed, until he was about going out of office, when to prevent their loss he put them with the other papers in the cause and handed them to his successor. When papers were considered by the surrogate as filed, it was his invariable practice, as he testified, to mark them as filed. These were marked only in the manner above stated.

Mr. Rolfe was sworn and in speaking of the bond stated that he filed it with the surrogate, and saw him make the memorandum upon it, but whether he knew the nature of it, does not appear. The surrogate stated that if asked whether he *officially* approved the bond, he would be bound to answer in the negative; for if he had officially approved it, the endorsement would have been "Approved and filed, March 29, 1847," and signed by him officially.

The surrogate further stated on his examination that the want of sufficient sureties was not what induced the non-filing of the papers: that he had learned perhaps that some difficulty had arisen between Mr. Spooner and Mr. Dean, the acting agent of Mrs. Miller, the client of Mr. Spooner, and that the conflict between counsel (referring to this difficulty and the employment of Mr. Rolfe, and his copartner in the place of Mr. Spooner,) was probably the reason why the bond was never *officially* filed, together with the matter of fees. With regard to fees, however, it may as well be stated here, that it does not appear that the surrogate ever demanded any the payment of which was refused, that any were due which were unpaid, or that he had any reason to doubt the payment of any which should become due.

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He stated, as before mentioned, to Mr. Rolfe, that he should require his fees for making the return, to which the latter answered that there would be no difficulty about that, and there the matter ended, the surrogate expressing no dissatisfaction upon the subject.

A petition of appeal was duly filed with the register of the Court of Chancery. The time for making the return to the appeal was extended sixty days by an order, the basis of which was a note from the surrogate stating his pressing engagements, and a copy of the order was served on and filed by the surrogate, and marked by him in the usual way as filed. He went out of office without making any return although Mr. Rolfe asked him as he, the surrogate, states, more than once if he had made it, and he adds that he don't think he had leisure to make the return from a pressure of other business. A return to the appeal was made by his successor nearly a year after the enlarged time for making it had expired—no motion to dismiss, or for leave to proceed, notwithstanding the appeal, however, has been made by the present plaintiff. After the making of the return the plaintiff, upon a notice served on Mr. Spooner as proctor for the administratrix, Mrs. Miller, under the provision in the R. S. (2 R. S. 178, § 20,) applied for and obtained from the surrogate an order for leave to prosecute the bond given by her on the issuing of letters of administration, and this suit has been accordingly brought. The plaintiff sets up the appeal insisting that is a bar, and the defendant contends that it is not.

Under the circumstances stated, I am of opinion, that the appeal was effectual, and constitutes a bar to the plaintiff's claim. The amount of the testimony of the surrogate as I regard it, is that although he seems to suppose that he did not, or at least doubts whether he did, approve the bond officially, and file it and the appeal, he did every thing required to constitute legally such approval and filing. There is nothing in the statute making it necessary that the bond should be endorsed as approved, or that it or the appeal, should be marked as filed. There is enough to show beyond question that he approved the bond in fact; and the receiving and retaining it and the appeal in his office, were a sufficient filing of them, although they were deposited in a drawer, instead of the usual place for filed papers, viz: a pigeon-hole.* The object of the statute is to give a right of appeal, and to give to the respondent in such case security, that he shall not be uselessly harrassed. This right, to be exercised under the qualification stated, is frequently of the greatest importance, and ought not to be permitted to be slightly taken away, and certainly not without the fault of the party entitled to it. If indeed a public officer by whom a bond is required to be approved to render an appeal effectual, should unjustifiably refuse to perform his duty, he might if there were not time or the legal means to compel him to do it, defeat the right, but it would be at the hazard of serious consequences.

* The ancient mode of *filing* was, by fastening papers upon a string, wire or thread, from the latin derivation of which the term had its origin. This has gone out of use, and there is now no particular mode of filing a paper, except by depositing it in the office.

In this case, the whole object of the law had been accomplished. The bond was good, and it was available to the respondents. The surrogate approved it, for he told the appellant's solicitor with regard to one of the sureties whom he did not know, (the inference being that he knew the other,) that what Mr. Rolfe had said *satisfied him of his responsibility, and as to both, that as they had justified he would not object to the want of sufficient sureties*. Making this avowal and retaining the bond and appeal, Mr. Rolfe was authorized to believe that the former was approved, and that both would be filed. Something must be left to the good faith of an officer. It certainly cannot be required that a party shall stand by and see every formal act performed. Even if Mr. Rolfe knew the nature of the endorsement, which was made by the surrogate, he could not construe that into a refusal to approve and file the bond; and it having been in fact approved, and the surrogate retaining it and the appeal, he would have been justified in standing on his rights and relying upon the effect which the law gave to these acts. If the surrogate, for any reason which he deemed sufficient, had expressly refused to approve the bond and declined to take it and the appeal for filing, and Mr. Rolfe had left them under such circumstances, the case would have been different. There is nothing, I think, in the distinction, that he did not *officially* approve the bond. He did not so approve it as he supposes, because he did not mark it as approved, but there is nothing rendering this necessary. The marking it as approved would be evidence of its approval, but it is not therefore the only evidence of it. The approval is not an act of which any record is required. The action of his mind was complete from what has been stated in approving its sufficiency. The provision for approving is a mere check or safeguard for the respondent's benefit; and if the surrogate on examination is not satisfied with the sureties, he need not and ought not to *accept* the bond.

There can be no doubt, also, I think, that in the event of a breach of the condition of this bond, it could be enforced for the benefit of the respondent. It would not be competent for the surrogate to say it was not filed, and thus to deprive the respondents of the right to resort to it, if the law adjudged that it was filed.

As to the motives which influenced the surrogate, he probably had doubts as to the right of the appellant to change her proctor, between whom and herself or agent a misunderstanding had arisen, and he may not therefore have been disposed to commit himself on the question, by endorsing or marking the papers on the appeal. But this ought not to prejudice the appellant. It would seem evident that he did not regard the appeal as nugatory, for he was instrumental, afterwards, in procuring an extension of the time to make the return, and received and filed the order extending the time, marking it officially as filed. This shows the light in which he regarded the appeal, and affords ground to infer that he would have marked the papers in the usual way, if he had had no doubt that the administratrix had a right, as she unquestionably had, to appeal by any solicitor she saw fit to employ for the purpose. (*Coates v. Cheever*, 1 Cowen, 400.) What he did, however, was clearly sufficient, in my

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opinion, to render the appeal effectual. The filing of the appeal and perfecting it by giving a bond, are, by the statute, to be deemed notice of the appeal to the adverse party. It does not appear that the surrogate, on any application to him in this case, stated that this had not been done, or that he ever was applied to in fact. If on such application, he had disclosed the facts as they existed, they would, I think, have constituted notice.

The appeal having been regular, it constituted a stay of proceedings, and the only way to get rid of it or its effect, if the appellant was guilty of improper delay, in procuring a return or in any other respect was to move the chancellor to dismiss it, or for leave to proceed notwithstanding the appeal. This is so well settled as scarcely to need the citing of authority. (See 1 Bar. Ch. Pr. 424, *et seq.*, and 4 Paige, 279.) In the case of Van Slyck in 10 Paige, 301, this course was resorted to for the purpose of procuring a dismissal of the appeal, even where the appeal bond had not been approved by the surrogate and for that very reason. There the bond had been left in the surrogate's office in his absence, and when applied to some time afterwards he refused to approve it on account of the insufficiency of the sureties.

The order giving leave to prosecute the bond does not affect the case. The appeal having suspended all proceedings on the surrogate's decree, the administratrix was no longer bound to obey it. The surrogate by causing a bond to be prosecuted, cannot destroy the effect of an appeal. Nor does it make any difference that this order was obtained after notice to the former proctor. Attorneys or proctors are not known to our law, as officers of surrogates courts for the purpose of serving notices upon them affecting the rights of parties and especially after a proceeding is terminated by a decree. (*Coates v. Cheever*, 1 Cowen, 460, *ub. sup.*; and see 1 Hill, 656; 5 Cowen, 446, and cases cited.)

Even if this case were to be regarded as a doubtful one, a court should be inclined to sustain the right of appeal rather than take it away, and upon the whole there must be judgment for the defendants.

TOOMEY v. SHIELDS.

PRACTICE—SERVICE OF SUMMONS WITHOUT COPY OF COMPLAINT—ORDER OF COURT TO RELIEVE DEFENDANT AND TO FILE PAPERS.

A plaintiff was served with a summons on the 10th August, but no copy of the complaint was served nor filed until the 31st August, on which day the plaintiff entered up judgment, and filed the complaint, as part of the judgment roll, and issued execution. It appeared that the defendant on the 27th August, by his attorney, had demanded a copy of the complaint, but that none had been served.

On motion to set aside the plaintiff's proceedings, *held*, that where a plaintiff does not serve a complaint with a summons, he is bound to file the complaint within twenty days after service of the summons, and that the plaintiff's proceedings must be set aside for irregularity. The defendant is not entitled to be served with a copy of the complaint unless he, in writing has made a demand of a copy thereof within ten days after service of the summons. The

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word "*thereafter*" in § 130 of the code has reference to the service of the summons, and not to the filing of the complaint.

The 416th section of the code which provides that an order may be obtained from a judge to compel the pleadings in an action to be filed, applies only to such papers as shall have been served.

THE facts appear in the adjudication.

Garrison, for defendant.

Waring, for plaintiff.

GREENWOOD J.—In this case, the summons was served on the 10th August, but no copy of the complaint was served nor was any complaint filed until the 31st August. On that day the plaintiff entered up judgment, filed the complaint as part of the judgment roll and issued execution. The defendant on the 27th August, by his attorney, demanded a copy of the complaint. A clerk in the office consented to furnish one but none was served. A motion is now made to set aside the plaintiff's proceedings for irregularity.

The 128th section of the Code provides that the summons shall require the defendant to answer the complaint and serve a copy of his answer within twenty days after service of the summons. By the 130th section it is provided that a copy of the complaint need not be served with the summons and that in such case the summons shall state where the complaint will be filed and if the defendant within ten days *thereafter* demand in writing a copy of the complaint a copy shall be served accordingly, and after such service the defendant shall have twenty days to answer.

I understand the meaning of these provisions taken together to be this: that if the plaintiff desires to place himself in a position to claim an answer in twenty days after the service of the summons, he must serve a copy of the complaint with the summons or file the complaint within the twenty days. If he does not serve a copy of the complaint with the summons then the defendant by demanding a copy within ten days *thereafter* may entitle himself not only to be served with it, but to twenty days' time to answer after the service shall have been made. The defendant cannot, however, require a copy of the complaint to be served unless he does so within ten days after the service of the summons upon him. The law gives him in this event the right to the service of a copy and to the additional time as a privilege, whilst at the same time it subjects a plaintiff to a corresponding delay as a kind of penalty for not serving the complaint with the summons. The term *thereafter* in the 130th section, refers I think to the service of the summons and not the filing of the complaint, because there is no other antecedent relating to time, and because, also, I think that this construction gives to the defendant all that can be reasonably required. Indeed if this word "*thereafter*" relates to the filing of the complaint and a plaintiff is not bound as is contended, to file it until he enters up judgment then either the defendant might in every case be prevented from getting a copy of the complaint in time to answer (a doctrine not to be admitted) or the

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judgment might be superseded, for the defendant would by demanding a copy within ten days after the filing, although after judgment, be entitled to twenty days to answer after the service of such copy. In this case the demand of a copy of the complaint was not made within the ten days after the service of the summons, and the defendant was therefore, in strictness, not entitled to it; although I think that the plaintiff's attorney, after what had transpired, should either have furnished a copy or informed the defendant's attorney that he declined to do so, before entering up judgment. If he had done this, the latter might have applied for some relief. This, however, is not the principal objection to the proceedings in this case. I am of opinion that the plaintiff not having served a copy of the complaint with the summons, was bound to file his complaint within twenty days after the service of the summons, so that the defendant could comply with the requisition to answer. A defendant is not obliged to avail himself of the privilege of being served with a copy of the complaint and of the additional time he may thus gain. He may answer if he pleases without adopting this course. By the terms of the summons he is required to answer the complaint within twenty days after service of the former without reference to the service of the complaint. The summons ought to receive a sensible and practical construction and it would be unreasonable to require a party to answer a complaint without informing him, or giving him the means of ascertaining what it is. It is no answer to this to say that he may demand a copy from the plaintiff within ten days. The ten days may be allowed to go by through the ignorance or the peculiar circumstances of the defendant's situation, and then if no complaint should be filed, the defendant would really have had only ten instead of twenty days which the law intended to give him from the service of the summons to answer, for he could not know what he was to answer. The object in requiring as the code does, where a copy of the complaint is not served with the summons, that the latter shall state where the complaint will be filed, is, that the defendant may before the time for answering expires go to the clerk's office where it is filed, and read or get a copy of it. The code, indeed, is silent as to how long before the expiration of the twenty days it shall be filed, but this is one of the instances of oversight which frequently occur in legislation, and does not affect the construction proper to be put upon it in other respects. If it be not filed within such reasonable time as to enable the defendant to answer, it will afford ground for relieving him on the most liberal terms. As to the ground taken by the plaintiff's counsel that the defendant could, under the 416th section of the code have obtained an order from a judge to compel the filing of the complaint, it will be observed that this section applies only to such papers as shall been served. It could not therefore include the complaint in this case.

The judgment and execution must be set aside, and the defendant must have five days to answer; but as, as this is somewhat of a new question, and the plaintiff may have relied upon an indirect *dictum*, in the code reporter, seeming to sanction his practice, no costs are to be allowed.

NEW RULES OF THE SUPERIOR COURT OF THE CITY OF NEW-YORK.

Adopted January 18th, 1851.

1. The general and special terms of the court will be held on the first Mondays of January, February, March, April, May, June, October, November, and December, in each year, and will continue until the last Saturday of such months respectively.

2. At the general terms the court will hear appeals, enumerated motions, and causes transferred from the supreme court, pursuant to the act of 1849, which have not heretofore been heard. The general term will open at eleven o'clock A. M.

3. The special terms will consist of a trial term, held by two justices severally, and a term held by one justice, which will be designated the special term. For the trial term, the clerk will prepare a calendar, containing the issues of fact to be tried by a jury. Such calendar will be called and regulated by the justice holding the principal trial court. The other justice, at the trial term will aid him in the side court, as heretofore practised. The trial term will open at ten o'clock A. M.

4. For the special term, the clerk will prepare a calendar, containing, first, the issues of law noticed for argument at such term, and second, all issues of fact noticed for trial, which are designated, on the notes of issue, as causes not required to be tried by a jury, by section 253 of the Code of Procedure, or in which a jury trial is waived. The special term will open at ten o'clock A. M., and the first hour will be devoted to the giving of judgment in undefended causes, and the hearing of litigated non-enumerated motions. The calendar will be taken up each day, at 11 A. M.

5. Non-enumerated motions will be heard by one of the justices, at the special term room and the chambers, daily, at 10 A. M., throughout the year,—except on New-Year's day, Good Friday, the Fourth of July, the day of the Annual Election, Thanksgiving day, and Christmas. For such motions, and for the purpose of making all necessary orders, and giving judgments in causes under chapter first of title eight, of the second part of the code, a special term will be held every day during the vacations, at 10 o'clock A. M.

6. The justices designated to hold the general terms, will attend at chambers daily, during their respective terms from 10 to 11 A. M., to dispose of *ex parte* applications, and of non-enumerated motions in which all the parties are present or represented. All applications for *ex parte* orders, and for judgments upon failure to answer, during the general terms, must be made before 11 o'clock A. M.

7. Appeals from all orders made on non-enumerated motions, will be heard on each Saturday during the general terms, at eleven A. M., and must be noticed for that time.

The court, at the conclusion of the June term, will appoint general terms, for hearing such appeals only, to be held during the vacation.

8. A party intending to move to set aside a verdict as against the evidence, must obtain from the justice who tried the cause, an order staying the proceedings for that purpose. Such a motion will not be

New Rules of the Superior Court.

entertained, unless the stay of proceedings be obtained and served within four days after the entry of the judgment by the clerk, or before the insertion of the costs by the clerk in the entry of the judgment. The court, by order, may permit the judgment to be entered and collected, without prejudice to a motion to set aside the verdict, and may impose such terms on each party, in respect thereof, as to the court may seem meet.

9. The party moving to set aside a verdict as against evidence, must prepare a case and procure the same to be settled in the usual manner. If the party making the case, intend to appeal from the judgment, when entered on the verdict, because of errors of law alleged to have occurred at the trial, or in the direction for judgment, he must present such alleged errors in the case made for setting aside the verdict. If the errors complained of were excepted to in due season when they occurred, the case may be turned into a bill of exceptions, as of course, in the event of the application to set aside the verdict being denied.

10. The motion to set aside the verdict on the case when settled, must be brought on, on the usual notice, at the special term. No alleged errors of law presented by such case, will be considered at the special term, unless by the express directions of the justice before whom the cause was tried.

11. If either party appeal from an order of a justice, granting or refusing a new trial on such case, the appeal may be brought on before the general terms, on the usual notice. If the order refuse a new trial, and there be alleged errors of law contained in the case on which the motion was made, the appeal from the judgment in respect of such errors of law must be brought on and argued at the same time with the appeal from the order refusing a new trial, at the special term.

12. The costs on an appeal to the general term, from a judgment, as well as from an order granting or refusing a motion to set aside a verdict as against evidence, when allowed by the court, shall be the costs prescribed in subdivision six of section three hundred and seven of the amended code, together with the expenses specified in section three hundred and eleven. But where an appeal from such order is heard at the same time with an appeal from the judgment in the cause, the court may in its discretion give costs on the former appeal, as if it were a motion at special term.

13. The party who moves for a re-hearing, or review of a cause or matter decided by a referee or referees, shall procure and furnish to the court a special report of the referee or referees, setting forth distinctly the facts found on the reference, and his or their decision upon the points of law arising in the cause.

14. The foregoing rules shall take effect immediately, and all existing rules inconsistent with the same are hereby repealed.

ACCIDENTS BY COLLISION.

Two cases of considerable importance were some time since tried in the Court of Exchequer in England. One, *Rigley v. Hewitt*, reported in 15 Law Times, 185, was an action against the driver of an omnibus for injury done to a passenger on another omnibus by a collision. It appeared that the plaintiff was riding on the outside of an omnibus, when the defendant drove another omnibus against it, and caused the plaintiff to be thrown off and severely injured. The jury found for the plaintiff, with £50 damages, and that the collision was occasioned by the negligence of the plaintiff. It was now on a motion for a new trial, contended that, if the mischief had been in part occasioned by the negligence of the driver of the omnibus on which the plaintiff sat, the defendant would not be responsible. But the Court of Exchequer held that it was not so. The defendant was liable for his own misconduct. "I am quite clear," said Pollock, C. B., "that every person who does a wrong is responsible at least for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct." The other is the case of a steamboat collision, but involving the same question of liability where the accident has been partly occasioned by the negligence of the plaintiff, or not wholly by the negligence of the defendant. In *Greenland v. Chaplin*, (15 Law T. 185,) the defendant's steamboat had run against the boat in which the plaintiff was, whereby an anchor was displaced, fell over, and broke the plaintiff's leg. The judge at the trial had left it to the jury whether there was negligence either in the stowage of the anchor, or in the plaintiff's being in a part of the steamboat where he ought not to have been, so that the injury might have resulted, in part at least, from his own negligence, or that of the boat in which he was. But it was held also by the Court of Exchequer that this law was *not* thus rightly put by the judge to the jury, for, said Pollock, C. B., who had tried the case, and now admitted that he had taken a wrong view of it, "the man who is guilty of a wrong, and thereby produces mischief to another, has no right to say, part of that mischief would not have arisen if you had not been yourself guilty of some negligence; and certainly I am not aware that, according to any decision that has ever occurred, the jury are to take the consequences, and decide thereon in proportion to the negligence of one or the other party." But, at the same time, his lordship expressly guarded himself against the conclusion that appeared to have been assumed in the argument. "I entertain," he said, "considerable doubt whether a man is responsible for all the possible consequences that may, under any circumstances, arise in respect of mischief, which, by no possibility, he could have foreseen, and which no reasonable person, under any circumstances, could be called upon to have anticipated. Whenever that case shall arise, I shall desire to hear it argued whether the rule of law is not this—that a man is expected to anticipate and guard against *all reasonable consequences*, but that he is *not* expected, by the law of England, to anticipate and guard against that which no reasonable man would expect to occur."

PUNCH ON SPECIAL PLEADING.

CHAPTER I.

PROCEEDINGS IN AN ACTION FROM THE COMMENCEMENT TO THE TERMINATION.

Actions are divided into *real*, in which there is often much *sham*; personal, in which personality is frequently indulged in by counsel, at the expense of the witnesses; and *mixed*, in which a great deal of pure nonsense sometimes prevails. The legislature being at last sensible to the shamness of real, and the pure nonsense of the mixed actions, abolished all except four, and for the learning on these subjects, now become obsolete, we refer to the "books" which have been transferred to the shops of Butter from the shop of Butterworth.*

The real and mixed actions not yet abolished, are, 1st, the writ of right of dower; and 2d, the right of dower; both relating to widows; but as widows are formidable persons to go to law against, these actions are seldom used. The third is the action of *Quare Impedit*, which would be brought against me by a parson if I kept him out of his living; but as the working parsons find it difficult to get a living, this action is also rare. The fourth is the action of ejectment for the recovery of land, which is the only action which cannot be brought without some ground.

Of personal actions the most usual are debt, and a few others; but we will begin by going into debt as slightly as possible. The action of debt is founded on some contract, real or supposed, and when there has been no contract, the law, taking a contracted view of matters, will have a contract implied. Debt, like every other personal action, begins with a summons, in which VICTORIA comes "greeting;" which means, according to Johnson, "saluting in kindness," or "paying compliments at a distance," but considering the unpleasant nature of a writ at all times, we cannot help thinking that the word "greeting" is misapplied. The writ commands you to enter an appearance within eight days, and, by way of assisting you to make an appearance, the writ invests you, as it were, with a new suit.

The action of covenant lies for breach of covenant, that is to say, a promise under seal; and under wafer it is just as binding, for you are equally compelled to stick to it like wax.

The action of *detinue* lies where a party seeks to recover what is detained from him; though it does not seem that a gentleman detaining a newspaper more than ten minutes at a coffee house would be liable to detinue, though the action would be an ungentlemanly one, to say the least of it.

The action of trespass lies for any injury committed with violence, such as assault and battery, either actual or implied; as if A, while making pancakes, throws an egg-shell at B, the law will imply battery, though the egg-shell was empty.

* Butterworth, a celebrated law bookseller in London.

THE

New-York Legal Observer.

VOL. IX.]

NEW-YORK, APRIL, 1851.

[MONTHLY PART.]

N. Y. Superior Court.

[*Transferred Calendar.*]

Before DUER and MASON, Justices.

JOHN NICHOLSON, CHARLES B. SPICER, and others, against DAVID LEAVITT
and JOSEPH C. VANDERVOORT, assignees, impleaded with JOHN W.
LEAVITT and RUFUS LEAVITT.

**ASSIGNMENT TO SELL UPON CREDIT AND APPLY PARTNERSHIP ASSETS TO PAY-
MENT OF INDIVIDUAL DEBTS.**

An intent to hinder or delay creditors, if not fraudulent, is not sufficient to vitiate an assignment for their benefit. Were it otherwise, no assignment for the benefit of creditors would be valid, since the necessary effect of any such conveyance is to hinder or delay the creditors by placing the property of the debtor beyond the reach of legal process.

A discretionary power given to an assignee to sell upon credit, although it may operate to delay the creditors, is no evidence of an intent to defraud them.

On the contrary, in most cases it is for the interest of the creditors that this discretion should be given to the assignee, and hence their assent to its grant will be implied.

For the same reason, where the power is not given in terms, the law will imply its existence.

The propriety of vesting this discretionary power in a trustee is constantly recognised in Courts of Equity.

That such is also the sense of the legislature is manifested by many provisions in the revised statutes.

The judgment of the Court of Appeals in *Barney v. Griffin*, (2 Comstock, 365), is not a decision that an authority to sell upon credit vitiates an assignment.

Where an assignment made by partners, of the partnership property, gives a preference to debts due from the partners individually, although it is void as against the creditors of the firm, it has not the effect of rendering the whole assignment void under the statute. It violates a rule of equity, not the prohibition of the statute.

When a provision is illegal, as contravening a statute, it renders the whole instrument void: when it is merely inconsistent with a general rule of law, the invalidity reaches no further than the provision itself.

A security taken from one partner, individually, does not extinguish a partnership debt unless it is clearly proved that it was accepted in satisfaction.

Even where the debt as due from the partners, in a court of law would be held to be satisfied, it is still regarded in equity as a subsisting debt, if it is certain that the monies were received, and have not been repaid by the firm.

Held, that the assignment by J. W. and R. Leavitt to D. Leavitt was not rendered void by the provisions authorizing him to sell upon credit, and to apply the partnership assets to the payment of debts due to him from the partners individually.

Bill dismissed with costs.

The plaintiffs in this case are judgment creditors of the defendants,
John W. and Rufus Leavitt, (who composed the late firm of J. W. &

N. Y. Superior Court.—*Nicholson and Spicer v. Leavitt and Vandervoort.*

R. Leavitt) and filed their bill in the late Court of Chancery, to set aside several assignments executed by them to the defendants, David Leavitt and Joseph C. Vandervoort, conjointly, or to David Leavitt, individually—as fraudulent and void against the creditors of said firm. The case was transferred from the Supreme Court to the Superior Court of the City of New-York.

The opinion of the Court was founded mainly upon the assignment executed on the 31st day of July, 1845—the more important provisions of which are the following :—

In this assignment—after reciting among other things that the parties of the first part or one of them were or was indebted to the parties named in a schedule annexed thereto for borrowed money,—also to David Leavitt in sundry large sums of money—also to Howland & Aspinwall—and that the said David Leavitt was under liabilities, commitments or obligations for the said parties of the first part or one of them ;—and that said parties of the first part were indebted to divers other persons and mercantile firms, and were desirous of paying the said several sums of money and of protecting the said David Leavitt against his said commitments and liabilities, &c. ;—and to pay and secure all their other creditors, they, said parties of the first part, assigned real and personal property to the said David Leavitt, upon trust “ that the said party of the second part and his assigns do and shall in such manner and at such time or times either at public or private sale, and for cash or upon credit, or partly for cash and partly upon credit and by and under such terms and conditions as he shall deem reasonable and proper, absolutely sell, convey and dispose of all the said assigned estate, &c,” and, upon the further trust, out of the said trust monies to pay in full the said several sums of borrowed money due and owing as aforesaid by the said parties of the first part, or either of them, &c., to the parties named in the schedule annexed to said assignment—then to pay the money due and owing to David Leavitt, and Howland & Aspinwall.

And upon the further trust, to distribute all the residue of the said trust monies “ at such reasonable time or times, as he in his discretion may think proper, to and among all the other creditors of the said parties of the first part.”

Henry Nicol, for the plaintiff.

I. The sale of personal property, owned by John W. Leavitt, on the premises occupied by him at Weehawken, New-Jersey, made to the defendant, David Leavitt, on the 26th June, 1845, was, both at the common law and by the laws of the State of New-York fraudulent, as against the creditors of the said John W. Leavitt, and should be declared void.

First.—The said sale was made to a creditor of the said John W. Leavitt, privately, and not in the ordinary course of business. It was not accompanied by an immediate delivery of the property, nor followed by an actual or continued change of possession.

Second.—The case discloses no evidence whatever to rebut the presumption of a fraudulent intent. The sole reason assigned by the

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defendant, David Leavitt, for leaving the property in the possession of the vendors, to wit: that he had no immediate use for the same, and that he believed it would be better preserved and kept on the premises, is clearly insufficient.

Third.—The property was left in the possession of the vendor, and the subsequent hiring of the same to the said vendor, for a rent or compensation, which does not appear ever to have been demanded, and which was never paid, cannot purge the transaction of its original fraud.

Fourth.—Nor would the hiring of the said property to the vendor, if made contemporaneously with or immediately after the delivery to the vendee, have given validity to the transfer, as against the creditors of John W. Leavitt.

The following cases were cited in support of the several subdivisions of the first point:

Jennings v. Carter, 2 Wend., 446; *Hall v. Tuttle*, 8 Wend, 375; *Fonda v. Gross*, 15 Wend., 648; *Hanford v. Artcher*, 4 Hill, 271; *Vance v. Phillips*, 6 Hill, 433; *Connah v. Sedgwick*, 1 Barb. S. C. R., 210; *Randall v. Parker*, in New-York Supreme Court, July term, 1849, reported in New-York Legal Observer, Vol. 7, p. 333; *Cameron v. Montgomery*, 13 Sergt. & Rawle, 131; *Coburn v. Pickering*, 13 New-Hampshire R., 415; *Young v. McClure*, 2 Watts & Sergt., 147.

II. The defendant, David Leavitt, being at the time of the sale of the said personal property, a resident of the State of New-York, and the agreement for said transfer and the crediting the amount as the consideration having been made therein, the validity of the transaction must be determined by the laws of the said state. Nor even if the sale should be deemed to have taken place, and to have been consummated in the State of New-Jersey, does it follow that the laws of that state are to be followed by this court in passing upon the merits of the transaction, if injustice will thereby be done to citizens of this state?

Story on Conflict of Laws, § 388, and authorities cited.

III. There is no evidence in the case that the laws of New-Jersey, in relation to the sale and delivery of personal property, are different from those of this state. In the absence of such evidence, the court is bound to presume the existence of the common law in that state, and cannot take judicial notice of any statute therein at variance with the common law. *Holmes v. Broughton*, 10 Wend., 75; *Leavenworth v. Brockway*, 2 Hill, 201; *Robinson v. Dauchy*, 3 Barb. S. C. R., 21.

IV. The several instruments of assignments executed by John W. Leavitt and Rufus Leavitt, to the defendants, David Leavitt and Joseph C. Vandervoort, and mentioned and referred to in the pleadings, were severally made with the intent to hinder, delay and defraud the creditors of the assignors and ought to be declared void.

First.—The provision in each assignment authorizing the assignees to sell the assigned property upon a credit at such times and upon such terms and conditions as they may think reasonable and proper, operates as a hindrance to the creditors of the assignors, who have

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a right to claim that the property of their debtor shall be appropriated without delay to the payment of his debts. *Hart v. Crane*, 7 Paige, 37; *Meachem v. Sternes*, 9 Paige, 405; *Barney v. Griffin*, in Court of Appeals, Oct., 1849.

Second.—The immediate and continued employment of John W. Leavitt, one of the assignors, as the agent of the assignees, at a compensation amounting to nearly \$2,750 per annum, paid out of the assigned property, when taken in connection with the admission of the defendants, furnishes sufficient evidence that the said John W. Leavitt was induced to execute the said assignments for the purpose of securing to himself the enjoyment of a portion of the assigned property, and that such purpose was effectuated. *Currie v. Hart*, 2 Sandf. Ch. R., 353.

Third.—The provision in the several assignments, preferring the separate indebtedness of each of the assignors to David Leavitt, over the creditors of the firm of J. W. & R. Leavitt, is a fraud on such creditors—*Because*,

1. It is a settled rule of equity in the case of an insolvent partnership, when jurisdiction has been acquired by the court, to apply the assets of the firm in payment of the partnership debts, and the individual property of each partner to the payment of the separate debts. *Wilder v. Keeler*, 3 Paige, 168; *Paine v. Matthews*, 6 Paige, 20; *Bogert v. Haight*, 9 Paige, 297.

2. Upon the insolvency of a partnership, where both partners are acting in concert to defraud the creditors of the firm, by giving preferences to their individual creditors, no court has jurisdiction to interfere on the part of a creditor seeking to avoid the proceedings, so long as his indebtedness rests in contract alone. Neither the assets of the partnership, nor those of the individual partners are subject to any specific lien on the part of the creditors. Such assets can only be marshalled at the instance of a complaining partner or his representatives, through whom the court, when it has once acquired jurisdiction, will work out and protect the equities of the creditors. *Robb v. Stevens*, 1 Clarke, 191. Trustees of Leake & Watt's Orphan House v. Lawrence, 11 Paige, 80. *Same case in Court of Errors*, 3 Denio, 588. *Kirby v. Schoonmaker*, 3 Barb. Ch. R., 46.

3. Such preference of separate creditors being clearly inequitable and wrong, the creditors of the copartnership cannot avoid the same except by a suit brought by them for an administration of the whole trust by the court, at their own cost and expense. It is a fraud upon creditors to impose such onerous restrictions upon them in the collection of their debts. *Jackson v. Cornell*, 1 Sand. Ch. R., 353.

4. The evidence in the case clearly established the fact of an existing separate indebtedness on the part of John W. Leavitt, to the defendant, David Leavitt, at the time of the execution of the several assignments, and the additional fact that no separate property of the said John W. Leavitt passed under any of said assignments. Answer of the def'ts., Schedule N., p. 91 of printed case. Testimony of John W. Leavitt, fol. 19 & 20.

5. The assignment by Rufus Leavitt, of his share of the property of the firm, to pay a separate debt of his partner, John W. Leavitt, for

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which neither the said Rufus Leavitt, nor his property was liable at law or in equity, was a direct fraud upon the copartnership creditors. *Jackson v. Cornell*, 1st Sand. Ch. R., 348. *Kirby v. Schoonmaker*, 3 Barb. Ch. R., 46.

Cases in support of the several subdivisions of the 4th point, in addition to those already cited: *Hyslop v. Clarke*, 13 Johns., 458. *Austin v. Bell*, 20 Johns., 442. *Mackie v. Cairns*, 5 Cowen, 547. *Wakeman v. Grover*, 4 Paige, 24. Same case in Error, 11 Wend., 187. *Mead v. Phillipps*, 1 Sand. Ch. R., 83. *Cram v. Mitchell*, 1 do., 251. *Cooke v. Smith*, 3 do., 333. *Boardman v. Halliday*, 10 Paige, 223. *Wight v. Prescott*, 2 Barb. Sup. C. R., 196.

V. The judgment in favor of the defendant, David Leavitt, against John W. Leavitt and Rufus Leavitt, entered by confession in the Supreme Court, on the 26th July, 1845, and the creditors' suit instituted upon the same, were fraudulent and void as against the plaintiffs in this suit.

First.—The proceedings connected with the entry of the said judgment; the issuing of the execution, the filing of the creditors' bill upon the return of the same; the service of the subpoena and injunction in said creditors' suit, after the execution of the assignment of the 31st July, 1845; the wholly unexplained neglect to take any further steps in such suit until the commencement of a similar suit on the part of a hostile creditor, and the palpably insufficient reason assigned in the answer of the defendants, for the filing of such bill, establish the presumption that such creditors' suit was not commenced with the *bona fide* intent of collecting a debt, but as a part of an entire scheme to prevent the property of the said John W. & R. Leavitt from being applied to the payment of their debts.

Second.—The covering the property of a debtor with a lien, the necessary effect of which is to deter other creditors from attempting to collect their debts, while it leaves the debtor in the undisturbed possession and enjoyment of his property, is a fraud upon them, and all the principles of law which obtain in the case of dormant executions, should be adjudged applicable to a case like this. *Beals v. Guernsey*, 8 Johns., 446. *Wickham v. Miller*, 12 Johns., 320. *Jackson v. Myers*, 18 Johns., 425. *Mackie v. Cairns*, 5 Cowen, 548. *Studson v. Brown*, 7 Cowen, 732. *Rew v. Barber*, 3 Cow., 237, and cases cited. *Wilder v. Fonday*, 4 Wend., 100. *Benjamin v. Smith*, 4 Wend., 332. *Kimball v. Munger*, 2 Hill, 364. *Knower v. Barnard*, 5 Hill, 377. *Payne v. Drew*, 4 East., 524.

V. The plaintiffs are entitled to a decree, that a sufficient amount of the property fraudulently disposed of as aforesaid, be set apart for the payment of their several judgments, with the interest thereon; and that the defendants pay the costs of this suit.

George N. Titus and *Edward Sandford* for the assignees D. Leavitt and Vandervoort.

I. The several assignments executed by the defendants, John Wand, Rufus Leavitt to David Leavitt and Joseph C. Vandervoort, and also to the defendant, David Leavitt, which are referred to in

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the pleadings in this cause, were, and each of them was made and accepted with an honest and bona fide intention of securing the payment of the debts mentioned therein, and not for the purpose of hindering, delaying or defrauding the creditors of the said assignors.

First.—The answer denies that these assignments or either of them, were or was made with any fraudulent intent towards creditors. The answer is responsive to the bill, and must be regarded as true on this point.

Second.—There was an actual indebtedness from J. W. & R. Leavitt, to the defendant, D. Leavitt, existing at the time said assignments were made.

The defendant, David Leavitt, had incurred liabilities for the accommodation of said firm, which were than outstanding, and for the payment of which they were bound to provide. Supplemental Answer, fol. 24-5-7. See also p. 162. *Cunningham v. Freeborn*, 11 Wend. Rep., 240.

There was also an indebtedness from said firm to the other parties provided for in said assignments.

Third.—All the property and effects embraced in said assignments which were in the possession or under the control of said assignors, or either of them, and could be reduced into actual possession, were delivered to the said assignees, immediately upon the execution and delivery of said instruments, and have at no time since been in the possession or under the control of the assignors, or of either of them.

Fourth.—The employment of an agent or agents by said assignees for the collection and realization of the large amount of debts and property embraced in said assignments, was proper and necessary.

The employment of J. W. Leavitt by said assignees to act as their agent, as stated in their answer, is no indication of any fraudulent intent on the part of said assignors in making these assignments. *Vreedenburg v. White*, 6 John. Cases, 156. *Cunningham v. Freeborn*, 11 Wend. Rep., 240. *Hennessy v. Western Bank*, 6 Watts and Serg't, 300.

There was no understanding or agreement that the assignees would appoint him to any agency connected with their trust.

Fifth.—The parties to these assignments could not have intended any fraud against creditors, as that would necessarily defeat the security intended to be given for the payment of the heavy debts and liabilities preferred in said assignments.

II.—Neither of the assignments referred to in the pleadings in this cause, does by its terms create any hindrance or delay to the creditors of the assignors in the collection of their debts, nor contain any provision which the law does not sanction and approve.

1st.—An insolvent debtor may secure preferences among his creditors, by an assignment of his property in trust, for their benefit. *Murray v. Riggs*, 15 John. Rep., 571. *Grover v. Wakeman*, 11 Wend. Rep., 194. 2 U. S. Digest, p. 455, Sec. 145.

2d.—In each of these assignments, the assignors have made an absolute and unqualified appropriation of their property for the payment of their debts, without any reservation of benefit or of control over the assigned securities to themselves, or either of them, until

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such debts are paid in full. *Grover v. Wakeman*, 11 Wend. Rep., 202.

3d.—The trust to sell for the benefit of the creditors was *absolute and unconditional*.

4th.—The trust to sell at private sale was lawful, and was manifestly calculated to benefit the creditors. *Hart v. Crane*, 7 Paige R., 27. *Lewen on Trusts, &c.*, 367 and 370.

5th.—The trust to sell upon credit, as the assignees should think reasonable and proper, is no evidence of an intent to hinder, delay or defraud creditors; neither was such the effect of this provision in these assignments. *Rogers v. De Forest*, 7 Paige S. C. R., 272. 22 Wend. Rep., 483.

The Legislature did not consider a sale on credit by assignees for the benefit of creditors, improper or fraudulent, as they have in express terms authorized trustees under several insolvent acts to sell on credit. 2 Rev. Stat., 42, § 7, Sub. 5.

The revisors, in their notes to this section, say: "The principle of allowing sales of property by trustees, on credit, is adopted in various other cases, from its manifest tendency to enhance the price." 3 Rev. Stat., 623, Appendix.

The Court of Chancery has in many cases directed receivers of insolvent corporations, upon a sale of its assets, to give a credit not exceeding eighteen months, from the day of sale.

Executors and administrators may give a credit not exceeding three years for three-fourths of the purchase money of lands sold by them. 2 Rev. St., p. 105, Sec. 28. *Ashurst v. Martin*, 7 Port. Rep., 566. *Pitriken v. Davis*, 1 Morris, Iowa Rep., 296. *Neally v. Ambrose*, 21 Pick. Rep., 185. *Hopkins v. Ray*, 1 Metcalf Rep., 79.

The assignment in the case of *Barney v. Griffin*, and *o'rs* 2 Comstock Rep., 365, was not adjudged fraudulent and void by the court, upon the ground that the trustees were authorized to sell on credit. Judge Bronson ALONE considered the assignment void for that reason. See the notes at the head of that case.

The late Court of Errors sustained an assignment which authorized the trustees to sell on credit. *Rogers v. DeForest*, 22 Wendell Rep., 483. *Rogers v. DeForest*, 7 Paige Rep., 272.

6th.—It is conducive to the best interests of creditors that assignees should be permitted to sell on credit. It is manifest that a sale of all the property and effects assigned to Leavitt and Vandervoort for cash, would result in a ruinous sacrifice, and a heavy loss to the creditors of J. W. & R. Leavitt.

III.—The several assignments marked H, I and J, contain no provision authorizing the assignees to sell the assigned property on a credit.

The assignments marked B to G inclusive, conveyed nothing but real estate, in different parts of the United States, and all lying out the State of New-York.

The validity of the last mentioned assignments must be determined by the *lex loci rei sitæ*, and not by the *lex fori*; the plaintiffs must show that by the *lex loci* these assignments are invalid, before they can be so adjudged by this Court. *Chapman v. Robertson*, 6 Paige

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Rep., 627. Story on Conflict of Laws, § 428, and cases cited in note 3.

The assignments marked A and L, embraced debts due to J. W. & R. Leavitt, in foreign States, and a few parcels of merchandise in New Orleans and Kentucky.

1st.—No part of the securities embraced in the above assignments could have been reached by the plaintiffs' executions if said assignments had not been made, and consequently they have not been hindered thereby in the collection of their debts.

2d.—The validity of these several assignments of personal property, cannot be determined by the laws of the State of New-York.

The domicile of John W. Leavitt was in the State of New Jersey.

Story on Conflict of Laws, § 383 and 4.

The actual situs of this personal property was out of this State when the transfer thereof was made.

Story on Conflict of Laws, § 398.

There is no proof that either of these assignments was executed in the State of New-York, and they must be presumed to have been executed with reference to the laws of the State in which the assigned securities were situated.

3d.—The provision in several of these assignments authorizing a sale upon credit, has no reference or application to the large amount of debts assigned. The fair inference is, that this provision was inserted by the draftsman, without instruction from the assignors; at all events, it authorized them to do no more than their duty would have required if this provision had been omitted.

4th.—It does not appear that the courts of any of the States in which this assigned property was situated have held, that the provisions of either of these assignments indicated an intention to hinder creditors in the collection of their debts.

The assignment marked K, is valid, under the provisions of the Revised Statutes, authorizing a trust to sell lands to satisfy any charge thereon. See p. 73 of case, 1 Rev. St. p. 728, § 55. *Rogers v. DeForest*, 22 Wend. Rep., 494, opinion of Senator Verplanck.

IV.—The trusts created by these several assignments could be executed by the trustees, without any exercise of the power to sell on credit, and these assignments should therefore be sustained, although the power to sell on credit should be adjudged invalid, *ut res magis valeat quam pereat*. *Rogers v. DeForest*, 22 Wend. Rep., 488, 494.

At the most, these trustees had a mere discretion as to the manner of disposing of this property, and were at all times under the control of the court in regard to its exercise. *Rogers v. DeForest*, 7 Paige Rep., 272.

V.—In case either of the aforesaid assignments should be adjudged invalid for any cause, the assignees, David Leavitt and Joseph C. Vandervoort, should not be required to account to the plaintiffs for the proceeds of the assigned property which had been paid or applied by them, as such assignees, pursuant to the provisions of such assignment, before the filing of the bill in this cause. They should also be allowed all their commissions, necessary expenses and disbursements in collecting or converting the assigned property into money. *Wake-*

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man v. Grover, 4 Paige Rep., 24, 43. *Hendricks v. Robinson*, 2 John Ch. Rep., 284.

Such accounting should be directed to be taken upon principles which shall fully indemnify and protect the assignees, and each of them, for all monies they have advanced under such assignment, and for all payments made to the creditors intended to be secured thereby, in good faith, before the bill in this cause was filed.

VI.—The sale of furniture and other personal property on the premises of the defendant, John W. Leavitt, in New Jersey, to the defendant, David Leavitt, on the 26th day of June, 1845, was made in actual payment of a portion of the indebtedness of J. W. & R. Leavitt to David Leavitt. It was not made with the intent to hinder or delay the plaintiffs in the collection of their debts. It was and is valid against the plaintiffs and all other persons.

1st.—The full appraised value of that property was paid at the time of the sale by a credit given to J. W. & R. Leavitt, by the defendant, David Leavitt, on account, to the amount of \$2,319 69.

2d.—There was a formal and complete delivery of this property in pursuance of the sale, and due publicity was given to the transaction.

3d.—The subsequent possession of this property by John W. Leavitt was in pursuance of a valid letting of the same to him for a full consideration agreed to be paid by him therefor.

The good faith of this transaction is most apparent, and the presumption of fraudulent intent which the continuance of possession in the vendor affords, is repelled by the evidence in the case. 2 Rev. Stat., p. 136, § 5; *Stoddard v. Butler*, 20 Wendell Rep., 507, note; S. C. opinion of Senator Dickinson, p. 534 to 538, 542; S. C. opinion of Senator Verplanck, p. 547, 551; *Smith & Hoe v. Acker*, 23 Wend. Rep., 653, 672, 677; *Cole v. White*, 26 Wend. Rep., 511; *Prentiss v. Slack*, 1 Hill Rep., 467; *Hanford v. Archer*, 4 Hill Rep., 271; Opinion of Bradish, President, &c., p. 299, &c.

VII.—The validity of the sale of the furniture and other personal property last referred to must be determined by the laws of the State of New Jersey, in which the defendant, John W. Leavitt, was domiciled at that time.

1st.—The possession of the vendor after sale of personal property in that State is not *per se* fraudulent as against creditors. *Sherron v. Humphreys*, 2 Green Rep., 217, 220.

2d.—In New Jersey fraud cannot be *presumed*, but it is a question for the jury and *must be established by proof*. *Mount v. Hendrickson*, 2 South Rep., 738, 743; *Tillow v. Britton*, 4 Halst. Rep., 121, 136, 138.

3d.—The statute of frauds in New Jersey does not declare the possession of the vendor after sale to be even presumptive evidence of fraud. Statutes of New Jersey of 18 , p.

VIII.—In the entering of the judgment, and the filing of the bill, on the 26th day of July, 1845, in the name of David Leavitt, against John W. and Rufus Leavitt, referred to in the pleadings in this cause, there was no fraud intended or committed, against the plaintiffs, or any person whosoever.

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All fraud in relation to these proceedings, is fully denied in the answer.

1st.—The reason and object of entering the judgment, and filing the bill last referred to, are fully and satisfactorily explained in the answer and testimony, and are consistent with good faith, and honesty of purpose towards creditors.

2d.—The object of this judgment and bill, was not to aid and give effect to an illegal assignment—but to secure the payment of an honest debt, independent of any of the assignments that had been previously made.

3d.—The plaintiffs have not been hindered in the prosecution of their claim to this assigned property, in consequence of this creditors' bill, because the plaintiff therein has not acquired any lien thereon by this proceeding, whether these assignments are good or bad, as against creditors. 2 U. S. Digest, p. 455, § 151, 2 and 3.

4th.—The defendant, David Leavitt, had an undoubted right to take this judgment, and file this creditors' bill, as a mode of collecting his debt, irrespective of the assignments—and to prosecute, or suspend the prosecution of that suit, as he thought most conducive to his interests, without subjecting this proceeding to the imputation of fraud. *McBroom vs. Turner*, 1 Stewart R. 72; *Phillips New Digest*, (Alabama,) S. C.

5th.—If this proceeding could be adjudged fraudulent, it might be set aside by a party who has been prejudiced thereby—but it cannot render invalid assignments made for the benefit of other creditors, and which contain no provision in violation of law.

IX.—There was a valid pledge of the securities referred to in the supplemental or further answer in this cause, made by the defendants, J. W. and R. Leavitt, to the defendant, David Leavitt, before either of the assignments mentioned in the pleadings therein was executed—which will be sustained by this Court.

X.—The Bill in this cause should be dismissed as to the defendants, David Leavitt and Joseph C. Vandervoort, with costs to be taxed.

DUER, J.—The provisions in this assignment, which, as illegal and fraudulent, are deemed to be fatal to its validity are, first: the discretionary power given to the assignee to sell the whole or any part of the property assigned upon credit, and, second: the declaration that the proceeds of the assignment are to be applied to the payment not only of the partnership debts, but of such as may be due to D. Leavitt from either of the partners.

In considering the questions that have been raised upon these provisions, we shall endeavor to lay aside the unfavorable impressions, which, we confess, have been made upon our own minds by the general character and objects of the assignment. It is not an assignment that a Court of Equity can feel any desire to sustain; not such, as an insolvent merchant, anxious to do justice to his creditors, is bound in conscience to make. Its object is not to secure a full and equal distribution of the partnership assets amongst all the creditors, by preventing any from obtaining by judgment, attachment or otherwise, a

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prior lien or right of satisfaction. Its object, we regret to say, is directly the reverse. It looks not to the interests of all the creditors, but mainly to those of a single individual. The chief design of the partners in this, and in all the assignments that preceded it, evidently was to protect to the extent of their ability, their relative and confidential friend, D. Leavitt, against any hazard of an ultimate loss. Hence, the liabilities incurred by him on account of the firm, and the debts due to him and to a few other creditors, are in the first place to be satisfied in full, and it is only in a remote possible surplus that the body of the creditors are entitled to share. These are the provisions which, as marring the equity of the instrument, we regard with no slight disfavor. The preference which they create in the order of payment, and which, while it probably secures the favored creditors to the full extent of their demands, leaves to those who remain, only a faint hope and doubtful chance of a fractional dividend, we condemn as a positive injustice, and lament that the law has denied to us the power of redressing the wrong. We know that the custom of giving such preferences has extensively prevailed, and is warranted in a measure by public opinion, as well as by the decisions of our Courts; but we are not the less persuaded that it is forbidden by public policy and is inconsistent with a sound morality. From an early day it has been a favorite maxim in the Court of Chancery, that amongst creditors "equality is justice," nor has this maxim been treated as a barren speculative truth. It has not been suffered to remain inert and lifeless, but the powers of the court in many cases are vigorously exerted to enforce its practical observance. It is plain, however, that this maxim, at once a principle and a rule of Equity, is never more grossly violated than when an assignment, which sacrifices the interests of the mass of creditors to the protection of a few, is admitted to be valid. Nor while we lament shall we attempt to explain the anomaly which has permitted this violation in the very court in which the doctrine it partially subverts has long prevailed, and in other and analogous cases is constantly enforced.

It is true that the debts preferred are usually considered and termed by the parties "honorable and confidential," and these deceptive terms doubtless conceal from many the mischiefs and the immorality of the system. But whether the terms are justly applied is a different question. There is indeed a mutual confidence and understanding when the debts are contracted. The friendly creditor lends his money or credit to furnish the capital which the borrower needs, in the confidence, express or implied, that he shall incur no risk from the insolvency of the debtor; but that, in all events, whatever may be the losses and sufferings of others, he shall be protected. But a secret confidence, by which the public is deceived, and creditors excluded from its knowledge and benefits, made the victims of their credulity and ignorance; a confidence, which in respect to third persons, is a source of delusion and an instrument of fraud, assuredly deserves any other name than that of honorable. It is not an agreement that it implies, but a conspiracy. It must not be imagined that we are alone in these opinions; the same views in substance have been expressed by two of the most eminent judges of our highest na-

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tional court, Justices Story and Baldwin, and in our own state by Chief Justice Nelson and Chancellor Walworth and other distinguished jurists, and in this city the experience of each succeeding year adds to the evidence of their truth. Hence we do not hesitate to say that were we at liberty to follow our convictions, we should rejoice to make the decree which the plaintiffs require. But we have no such liberty. The right of an insolvent debtor in making an assignment for the benefit of his creditors, to secure a priority in the order of payment to any particular creditor or class of creditors, is firmly established by a long series of decisions. It is now the undoubted law of the state, and however serious may be the conviction of judges that the allowance of the practice tends to injustice and tempts to fraud, the Legislature alone is competent to apply the remedy. Until the existing law shall have been altered by the action of the national or state legislature, our jurisprudence must remain liable to the reproach, that we are the only nation in the civilized world, in which a merchant, knowing or contemplating his insolvency, is allowed to place his whole property beyond the reach of the body of his creditors, by devoting its avails, principally or exclusively, to the satisfaction of the claims of a few. In every civilized country but our own, it is not only a truth in morals, but a rule in law, that the property of an insolvent debtor belongs to his creditors, in the proportion of their debts, and that every disposition made by him in contravention of their equal rights, is null and void.

As the condition of our law, however, compels us to say that those provisions in this assignment which we would willingly exclude, are certainly valid, it is clear that we ought not to permit them to affect our construction of other provisions, which separately considered, we should regard as beneficial or harmless. If the power given to the assignee to sell for cash or upon credit in his discretion, is no evidence of a fraudulent intent, when the assignment is for the equal benefit of all the creditors, we can perceive no ground for saying that where a distinction is made in the order of payment, a different construction ought to be adopted. If the power is proper or innocent in the one case, it must be so in the other, or if there is any difference, it is when preferences are given that the body of the creditors have the least reason to complain that the power is granted, since in this case, it is probable, that they, especially, will be benefitted by its exercise. Its judicious exercise may be the only means of creating a surplus. At any rate, the mere fact that two provisions, independent in their nature, are found in the same instrument, can never avail to stamp upon them, or either of them, the character of fraud when the provisions, separately construed, are admitted to be lawful. This remark is so obviously just, that it may seem unnecessary to have been made, yet such is its pertinency, that we are satisfied, that if assignments for the benefit, without distinction, of all the creditors had been alone permitted, the propriety of giving an authority to the assignee to sell upon credit, would never have been doubted; still less, would the validity of the power when given have been drawn in question.

That question, however—for in substance it is the same—is now

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raised and must be determined, and we are bound to yield our conviction to the arguments and authorities upon which the counsel for the plaintiffs insisted, if they in reality possess the force which he evidently believed to belong to them. We shall state succinctly, the reasoning of the learned counsel as we understood him. It is not necessary, he contended, in order to enable creditors to set aside a conveyance or assignment made by the debtor, that an actual intent to defraud the creditors should be averred or proved. The words in the statute of frauds, are in the alternative "hinder, delay or defraud." (2 R. S., §.) The intent to hinder or delay is as much prohibited by the statute, as the intent to defraud, and consequently when apparent or proved, must have the same effect, that is, must be just as fatal to the validity of the instrument to which it applies. But the intent of the debtor to hinder or delay his creditors must always be implied, where such is the necessary effect of any provision in the instrument of assignment, or of the exercise of any authority or power, which the instrument confers. An authority, therefore, given to the assignee to sell upon credit, is conclusive evidence of such an intent, since the necessary effect of the exercise of the power is to hinder and delay the creditors by compelling them to wait for the whole, or a portion, of their dividends until the term of credit shall have expired. The right of the creditors is to have the property sold immediately and for cash, and consequently a direction or authority to postpone the sale or to sell upon credit, is a hindrance or delay in violation of their rights, and as such, although given and meant to be exercised for their benefit, and, therefore, wholly free from the imputation of fraud, vitiates and nullifies the assignment.

This reasoning, it is not to be denied, wears a face of plausibility, but it is very far from commanding our assent; on the contrary, we are constrained to deny both its premises and its conclusion. It proceeds upon a construction of the statute that we wholly reject, and were this construction admitted to be true, it would not control our decision, since the necessary consequence of a sale upon credit, is by no means such as the argument implies.

First, as to the construction of the statute. It is not true that where there is no evidence of a fraudulent intent, every assignment by an insolvent must be held to be void, if the necessary effect of its provisions or of any of them is to hinder and delay the creditors, for to assert this as the true construction of the statute is to affirm that no valid assignment, by an insolvent, of all his property in trust for his creditors has ever been made, or so long as the statute shall remain in force, can be made. The necessary effect of every such general assignment, even where the creditors are to be paid *pari passu*, is to hinder and delay them in the collection of their debts, by withdrawing the property from the reach of any legal process to which they might wish to resort. Not only is such the necessary effect, but the actual intent of the debtor is to place the property beyond the immediate power and action of his creditors, by preventing them from obtaining any judgments by which it may be bound, or from issuing any executions or attachments under which it may be sold. He means to *hinder* the creditors from collecting their debts

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out of his property by any proceedings against himself as their debtor, and to delay them from receiving any portion of their debts until they shall become entitled to a dividend under the assignment, and the intent thus to hinder and delay them is not only to be plainly deduced from the nature of the trust, but not unfrequently is confessed in its terms. In fact it was upon this very ground, the apparent and certain intent to hinder and delay the creditors, that, originally, the validity of a general assignment, although for the benefit of all the creditors without distinction, was not only seriously doubted, but seriously contested. In an early case, in which the action was brought by the assignee against a sheriff, who, by virtue of an execution against the debtor, had levied upon the property assigned, and in which it appeared in evidence, that the assignment had been executed and delivered only a few days before the judgment was recovered, the judge who tried the cause, instructed the jury that if they believed from the evidence that the intent of the debtor in making the assignment was to defeat the remedy of the creditor under the judgment, it would be their duty to find a verdict for the defendant; and the jury being satisfied that such was the intent, followed in their verdict the direction that was given; yet in this very case, the Court of King's Bench, notwithstanding the intent to hinder and delay had been expressly found by the jury, held the assignment to be valid, and upon that ground set aside the verdict, as contrary to law. (*Pickstock & Lyster*, 3 M. and Set. 371, Vide, *Braddish v. Watson*, 1 Price, 6,) and from that time to the present, so far as we have been able to discover, neither in the English Courts nor in our own has the validity of similar assignments ever been questioned.

It seems, however, impossible to deny that these decisions are a plain violation of the Statute of frauds, if we look merely to the words of the Statute and understand them in their literal extent. The words of our present Statute (and those of the English Statute and of the former acts of our Legislatures upon the subject are substantially the same), are, "that every assignment made with the intent to hinder, delay or defraud creditors of their lawful suits, damages, debts or demands as against the persons so hindered, &c., shall be void." (2 R. S., p. 137, § 1.) And yet the courts have held and the law is established, that although the intent to deprive all or particular Creditors of their lawful suits, and hinder or delay them in the recovery of their just demands, is confessed or proved, still the assignment, if by its terms all the property which it embraces must be applied rateably or otherwise to the payment of all the debts must be sustained. It is not void even against the persons who in fact are very materially hindered and delayed and were meant to be so. It is valid even against the creditors whom it deprives and was intended to deprive of that full satisfaction of their debts, which by their superior diligence in prosecuting their suits they would otherwise have certainly obtained. The explanation is, that although in these cases, the intent to hinder and delay the creditors is manifest, it is just as certain that there was no intent to cheat or defraud them, and the reasonable construction of the Statute is, that it is only such a hindrance or

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delay as was intended to operate, or if permitted, would operate as a fraud, upon the creditors that was meant to be prohibited. All the law can reasonably demand of a debtor is, the faithful application of his entire property to the satisfaction of all his debts, and where, by the terms of the assignment this is secured, the hindrance or delay which they create, however they may operate to the prejudice of particular creditors, are disregarded, since in reality they are only the necessary means of accomplishing a justifiable and lawful end. They fall, it is true, within the words of the Statute, but as they are free from the imputation of fraud, and produce no benefit to the debtor at the expense of the creditors, they are not embraced within its meaning, and are justly excluded from its operation. It is perhaps needless to sustain these remarks by a reference to particular cases, since the truth of that construction of the Statute which they assert, is necessarily implied in every decision by which an assignment made by a debtor with a knowledge or in contemplation of his insolvency, has been adjudged to be valid; the cases, however, of *Meux v. Howell*, in the King's Bench (4 East. 1), and in our Supreme Court and subsequently in the Court of Errors of *Wilder v. Winne* (6 Cow. 284, S. C.; 4 Wend. 100), are express decisions that a hindrance or delay which, although intentional is not fraudulent, is no violation of the Statute. There are one or two observations, which the terms of the Statute in its revised form, forcibly suggest, that it may not be useless to add: While the Statute of frauds retained its original form, the doubt was not unreasonable, whether the intent to hinder and delay creditors, as distinguished from, and excluding the intent to defraud them, was not alone sufficient to vitiate an assignment, but this construction as it seems to us, is positively excluded by the new provisions of the Statute. It is excluded by the section which declares that the question of "fraudulent intent, in all cases arising under the provisions of the chapter, shall be deemed a question of fact and not of law," (2 R. S., p. 137, § 4.) thus plainly considering that question as in all cases, the question necessary to be determined, in judging of the validity of a conveyance or assignment, as consistent or inconsistent with the provisions of the chapter. Should it be said that the intent to hinder and delay creditors is a fraudulent intent in judgment of law, and therefore embraced by the new provisions of the statute, the reply is that in adopting such an interpretation, we should re-establish the doctrine of constructive fraud, a doctrine which we have certain evidence that the revisers and the legislature, in conformity to the opinions delivered in the Court of Errors, in *Verplanck v. Sterry*, (12 John. 555,) and in *Jackson v. Seward*, (5 Cowen, 69,) designed to abolish, and which the section that we have read, if construed according to the intention of its authors, does effectually abolish. (3 R. S., 2 ed. notes of Rev., p. 658; vide, also, the observations of Ch. J. Nelson, in *Cunningham v. Freeborn*, 11 Wend., p. 251.) It may be that the doctrine thus meant to be exploded, has been in a measure revived by some modern decisions, but we are satisfied that to revive the doctrine is to repeal the statute. A constructive fraud was necessarily a question of law. It was a fraud that the judges, in con-

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struing the provisions of a conveyance or assignment, presumed to exist, not only without evidence that it was intended by the parties, but even in cases where no such intention could have existed, as where a voluntary conveyance by a solvent grantor, was held to be fraudulent as against subsequent creditors or purchasers. But the intent to defraud, considered as a question not of law but of fact, can only mean the intent actually existing in the mind of the party at the time of the performance of the act which it is alleged to vitiate. In respect to creditors, a fraudulent intent existing in the mind and vitiating the act of the debtor, can only mean that his real design, apparent or covert, in making a conveyance or assignment, was to prevent the application of the property, in whole or in part, to the satisfaction of his debts, and consequently when the object of a provision by which the creditors may possibly be delayed, is not to defeat or evade, but to render more certain the payment of their demands, it is an abuse of reasoning and a perversion of language, to construe the provision as evidence of his intent to defraud them.

These general remarks, it is readily seen, involve in a great measure our decision of the particular question now under consideration. Let it be admitted that the exercise of a discretionary power to sell upon credit may create a delay in the payment of dividends to creditors, yet unless the grant of the power is conclusive evidence of an intent to defraud them, and this not an intent which the law raises by construction, but which we are required to believe, and must believe, existed as a fact, the admission that they were meant to be delayed is wholly immaterial. It is wholly immaterial, unless an intent to delay and an intent to defraud are identical or inseparable. If from the nature of a power to sell upon credit, it could only be exercised for the benefit of the debtor at the expense of the creditors, or if it is proved that there was a secret agreement that it should be exercised for such a purpose, in either case, the grant of the power might be justly construed as an intentional fraud, but that there was any such agreement between the debtors and the assignee in the present case is not alleged nor we believe suspected; nor is it pretended that the debtors could derive any other advantage from the exercise of the power, than by its rendering the property assigned more extensively available to the satisfaction of their creditors. Upon the case as it stands, the pleadings and the evidence, we have no right to say, nor suppose, that there existed any other motive for the creation of the power, than the belief of the parties, that by its exercise the fund, out of which alone the debts could be paid, would be materially enlarged. The creditors were perhaps to be delayed, but they were so in order that they might be paid; and it is this power, created from this motive, and intended and calculated to produce this effect, that we are required to say as conclusive evidence of a fraudulent intent, renders the assignment void upon its face. This, so long as we are permitted to exercise our own judgement we cannot say. On the contrary, when we take into consideration the nature and condition of the property assigned, its magnitude, local situation and wide dispersion, we are convinced that the inference of a fraudulent intent would have been far more probable, had the

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power to sell upon credit, instead of being granted, been expressly denied. A positive direction to sell the whole property immediately and for cash would have been the worst direction, in relation to the interests of the creditors that could possibly have been given, and although it could not perhaps have been relied on as evidence of fraud, it would certainly have raised and justified the suspicion; while on the other hand, in the actual circumstances of this case the authority given to the assignee to sell upon credit was so plainly essential to the due execution of his trust, that the omission to grant it might well have been regarded as a breach of moral duty—the duty which the assignors owed to their creditors. The whole property of an insolvent debtor, if sold immediately and for cash, must be insufficient to discharge his debts for the very term insolvency implies the existence of the fact. If the property is large in its amount, and scattered in its locality, its immediate sale for cash, it is certain, will involve a heavy loss, and perhaps, looking to the interests to be protected, a ruinous sacrifice, while from the same property, if sold upon credit, with the exercise of ordinary judgment, a sum may be realized equal to its value, and perhaps sufficient to meet the demands of the creditors. Hence, in these cases, and they comprehend a large proportion of mercantile failures, it is so manifestly for the interests of the creditors that the assignees should have a discretion as to the time and mode of disposing of the property, that the assent of the creditors to the grant and exercise of the discretion, if necessary to render them valid, upon a general principle of law, should be presumed; and upon the same principle, even when the discretion is not given in terms, its existence should be implied. It is doubtless upon this ground that the Supreme Court of Massachusetts has decided that the assignees of an insolvent debtor have an implied authority to sell upon credit, and Chancellor Walworth, in a case to which we shall hereafter refer, has expressed a similar opinion. (*Neally v. Ambrose*, 21 Pick, 185; *Hopkins v. Ray*, 1 Metc. p. 79.) If the law says that the authority as necessary and beneficial, is given by implication, we shall not commit the absurdity of saying that it is illegal and fraudulent when given in terms.

When a fund which is to be distributed among several persons as *cestuis que* trust is to be realized from the sale of property real or personal, that it is expedient to give to the Trustee a discretionary power of selling upon credit, is a principle that has long been established in the practice of Courts of Equity. When such a sale is made under a decree, the power is usually given, and its insertion, in an order for the sale of real estate by a receiver, is considered by counsel and by judges as a matter of course. Nor is it merely in the practice of the courts that the principle has been sanctioned. It has the sanction of the legislature. Thus, where a sale of real estate for the purpose of satisfying the debts of a testator or intestate is ordered by a surrogate, the executors or administrators making the sale are expressly authorized to give a credit, not exceeding three years, for three-fourths of the purchase money, (2 R. S. p. 105, § 282, 2d Ed. p. 43); and in citing this instance we remark, that it seems to us impossible to state a rational distinction between the rights of the creditors of a

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deceased person, and those of the creditors of a living insolvent, or to explain why the rights of the latter should be deemed to be violated by a sale upon credit, and those of the former to be protected and preserved. It has indeed been said, that the creditors of a living insolvent have an absolute, unconditional right to the immediate application of his property, by its conversion into money, to the payment of their debts, but we are not aware that any who have asserted this doctrine, have attempted to show why the right of the creditors of a deceased insolvent to the immediate application of his property by the same process, to the same object, is not just as absolute and unconditional. If in this last case, a sale upon credit is proper to be allowed for the purpose of obtaining a higher price for the property, and thereby securing a fuller satisfaction of the debts, no reason has been, nor we venture to affirm, can be given, why, upon the same grounds, it should not be allowed in the former.

Nor is that which we have cited the only case in which the propriety of giving to trustees a discretionary power of sale has been recognised by the legislature. This discretion, in relation to sales of real estate, subject to a limitation as to the period of credit, is given to the statutory trustees of the estates of all non-resident, absconding, and insolvent debtors, and although the trustees have no power to sell the personal property upon credit, yet the immediate sale of the whole is not required; but dividing it into lots or parcels, the trustees are authorized to sell from time to time, as they may deem expedient; thus giving the sanction of the legislature to a temporary delay and imposing no limits upon its duration, and proving conclusively that the power of creating a delay with the sole design of increasing the fund for the payment of debts, so far from operating as a fraud upon creditors, is in the judgment of the legislature necessary to their protection against that sacrifice of value to which an immediate sale would probably lead. (1 R. S., 2 Ed., p. 798, § 9.)

The perfect analogy that we here find, precludes the necessity of further remarks, and puts an end to this branch of the argument, and we close it, impressed with the conviction that a Court of Justice has no right to say that a debtor who has conveyed his property in trust for his creditors, intended to hinder, delay, or defraud them, by giving that discretionary power to a trustee, which the legislature has in effect declared, that all trustees, for the benefit of creditors, ought to possess. And had our own views, upon the question we have discussed, been widely different from those we have expressed, we deny that as judges, we could have been justified in making them the basis of a decree, in opposition to this declared sense of the legislature. It is true that in all the instances we have quoted, the power to sell upon credit is confined to sales of real estate, but the arguments that are urged to prove the illegality of the power, do not at all depend upon the nature of the property to which it relates. If these arguments are valid at all, they apply, with equal force, whether the power relate to real or personal estate, and if, when limited to the real, it is no evidence of a fraudulent intent, it certainly is not rendered so by its extension to the personal, nor has it been asserted or intimated that such a distinction exists. In the case in

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the Court of Appeals to which we shall hereafter advert, and which has been pressed upon us as an authority not to be resisted or evaded, the power which it is said was adjudged to be invalid, related exclusively to the disposition of the real estate. The deed which was set aside as fraudulent, embraced only the lands of the debtor.

So far it has been conceded that a delay of the creditors is a necessary consequence of sales upon credit, and hence that the intent to delay them may be justly inferred from the grant of the power, but the concession, we are convinced, was unnecessary to be made. A delay in the payment of the debts is not a necessary effect of a sale upon credit, and a grant of the power to make such sales, is in reality no more evidence of an intent to delay creditors, than of an intent to defraud them. It is true that the power to sell upon credit may be abused, and so may every other power vested in a trustee, but we have no right to presume, that an abuse of the power was intended, or will occur; on the contrary we are bound to presume that it will be fairly exercised, and with ordinary prudence and judgment and that it was with this intent and expectation that it was originally granted. Hence when sales are made upon credit, we must presume, that adequate security for that portion of the purchase money for which credit is given, will be taken. The assignee is not bound to suspend the payment of dividends, until the securities he has taken arrive at maturity and their amount is collected. He may without delay convert them into cash by sale or otherwise, and in many cases with little abatement from their value, and it is this course which he is bound to follow, whenever the interests, or the wishes of the creditors, require it. Now it is quite certain, as a general rule, that there is much less difficulty in raising money by the transfer of good securities, real or personal, than by the sale of the property upon which they are founded, and it is equally so that advantageous sales upon credit may frequently be made, when an immediate sale, requiring the whole consideration to be paid in cash, would be impracticable. The result of these observations is, that in numerous cases, not only by judicious sales upon credit, will a higher price be obtained, but by the transfer of the securities, the assignee will be placed in funds more expeditiously than if the terms of the trust, taking from him all discretion, had compelled him to sell immediately and for cash. The dividends of the creditors will not only be larger, but will be sooner paid.

And here, if the question were to be determined upon principle alone, we might close the entire discussion, but if the counsel for the plaintiff is right, the reasons that we have given, whatever force might otherwise be allowed them, are overborne and set aside by the paramount authority of a recent decision—the decision of the Court of Appeals in *Barney v. Griffin* (2 Comst. 365). The question in this case arose upon a conveyance of real estate, in trust for the payment of certain specified debts and the objections to the validity of the deed were, 1st. That the trustees after selling so much of the property as might be sufficient to satisfy the debts secured, were to reconvey the residue to the debtor, thus excluding the general creditors; and 2d, That the trustees were empowered to sell upon credit. Mr. J. Bron-

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son delivered the judgment of the court, and it is not to be denied that the plain import of his language is, that upon both the grounds that have been stated, the conveyance was adjudged by the court to be fraudulent and void. His opinion really seems to admit of no other construction. The reporter, however, in his preliminary notes makes an important distinction. He states the position that an assignment of an insolvent estate, is wholly void when it confers an express authority to sell upon credit, as held by Bronson J., but places the judgment of the Court exclusively upon the other ground—the illegal reservation of the surplus. We should have doubted whether the statement of the reporter could have been regarded by us, had not satisfactory evidence been placed in our hands, since the hearing, that it was made, not only with the knowledge, but upon the authority of Mr. J. Bronson himself. It by no means follows that the views of this learned judge were rejected by his brethren, but it is certain that they withheld their assent and never meant to affirm them by their decision. Hence the authority that has been relied on as paramount and controlling, shrinks when examined, from an adjudication of the court into an opinion, unauthorized by his associates, of a single judge. The eminence of Mr. J. Bronson as a jurist is confessed by all, and his opinions upon every question that he examines, are entitled to great respect, but they have no obligatory force, nor in the discharge of our own duties, can we follow them, except so far as the reasons which he gives, and the authorities which he cites, command our assent. The reasons which he gives for his opinion in *Barney v. Griffin* are those which we have examined, and found ourselves compelled to reject, and he refers to no other authority than the incidental remarks of Chancellor Walworth in *Meacham v. Sternes*, (9 Page 405). These observations of the Chancellor, however, have no reference to a mere authority to sell. They relate to a positive direction, and this a direction not to sell upon credit, but by retail, in continuance of the business of the debtor; and we have the personal authority of the Chancellor for saying that his remarks in *Meacham v. Sternes* have never been understood by him as conflicting with, and far less, were they intended to overrule, his own prior and deliberate judgment in *Rogers v. DeForest* (7 Page 272), a case which seems not to have been cited in the Court of Appeals, and probably for that reason, escaped the attention of Mr. J. Bronson.

In *Rogers v. DeForest* there were several assignments, comprehending all the real and personal estate of the debtor, but the questions that were raised and decided seem to have related solely to the construction and validity of a conveyance of real estate upon trust to sell or mortgage the same for the benefit of creditors, with a power to the trustees to sell upon credit. The objection founded upon the discretionary power of sale, the Chancellor distinctly overruled upon the grounds that the power expressed no more than was usually implied, and that it tended in no degree to hinder, delay or defraud the creditors. But the trust to mortgage was in his judgment unauthorized by the statute and inseparable from the trust to sell, and upon this ground he decreed the conveyance to be void. The case was afterwards carried to the Court of Errors and is reported under the

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title of *Darling v. Rogers*, 22 Wendell, 483. A different construction was given to the deed in that court. It was there held that the trust to sell and the trust to mortgage were distinct and independent, and that the admitted legality of the first was not at all affected, by the invalidity of the second. The decree of the Chancellor was therefore reversed, and the deed, with the exception of the trust to mortgage the property, adjudged to be a valid and effectual conveyance for the purpose intended. The counsel for the defendants remarked that although the decree of the Chancellor was reversed, yet his opinion that the validity of the deed was not affected by the authority given to the trustees to sell upon credit, was by a necessary implication, adopted and affirmed, since, if the Court of Errors believed this opinion to be erroneous, it followed inevitably that the deed was void, and the decree of the Chancellor, instead of being reversed, must therefore have been affirmed. The observation is perfectly just, if the question was argued at all in the Court of Errors, but it does not appear from the report that such was the fact, and we are therefore not prepared to say that a decision corresponding with the opinion of the chancellor, is necessarily involved in the decree finally pronounced. If the question was raised in the Court of Errors, the decree in *Darling v. Rogers* has settled the law, and if it was not raised it follows that a position, for which the able counsel for the respondent had strenuously contended in the court below, was abandoned in the court of last resort, from the conviction that it was so plainly unreasonable and untenable as to leave no room for a hope that it would be finally established. Upon either supposition the decree in *Darling v. Rogers*, taken in connection with the previous and positive decision of the Chancellor, is regarded by us as an authority to which our own adverse opinion, had such been entertained by us, must have been surrendered.

Our decision is that the provisions in the general assignment from the partners to D. Leavitt, by which he is authorized to sell and dispose of the estates and property assigned, "at such time or times, either at public or private sale, and for cash or upon credit, or partly for cash and partly upon credit and under such terms and conditions as he may deem reasonable and proper," furnishes no evidence, conclusive or presumptive, of an intent to hinder, delay or defraud the creditors of the firm, or of the individual partners, and therefore furnishes no ground for impeaching the validity of the assignment.

It may be thought that we have bestowed a very needless amount of care and labor in the examination of the question we have decided, but it would be a great mistake to suppose that the parties before us are alone interested in its decision. It is a question that affects widely and deeply the interests of the community in which we live. There are strong reasons for believing that a very large amount of real property in this city is held under titles, derived from the trustees or assignees of insolvent debtors, under voluntary assignments, in which, as large or nearly as large, a discretion is given to the assignees, as to the time and mode of disposing of the property, as is contained in the provisions of the instrument now before us. It is known to every lawyer of experience, that for a period going as far

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back as the memory of the oldest of us can reach, it has been usual in this city to insert such provisions in the assignments of insolvent's estates, and when we call to mind the number and the magnitude of the mercantile failures terminating in such assignments, that have occurred during the last twenty years, we shall hardly venture to estimate the present value of the property, which they have operated to transfer. It may be that in many, perhaps in a majority of these instruments, an express authority to sell upon credit is not given, but in all, (for the exceptions are too few to weaken the force of the assertion,) the assignees are authorized to sell "the whole or any portion of the property assigned, at public or private sale," or "from time to time," or "at such time and in such manner," or under such terms and conditions "as they may deem reasonable and proper," and it is manifest, upon a very slight consideration, that wherever these or other expressions of equivalent import are used, the assignment is liable to be impeached, exactly upon the same grounds, as when an authority to sell upon credit is given in terms. The effect, in all these cases, is to give to the assignees a discretionary power, by the exercise of which the creditors must or may be delayed, and from the grant of which, the intent to delay them must therefore be inferred. If it be true, as has been confidently asserted, that when an assignment is made in trust for creditors, they have an absolute and unqualified right that all the effects and property assigned, shall without delay be converted into cash by an actual sale, and that every assignment which contains a provision by which this right of the creditors is or may be violated, is upon its face, fraudulent and void, it may be seriously doubted, whether a single assignment is to be found upon our public records that would endure the application of the test. Reflecting upon these facts, it is impossible to think without much solicitude of the extent to which the security of titles in this city will be affected and shaken if the doctrine, which the recent decision in the Court of Appeals is supposed to have established, shall ultimately prevail; for it must be remembered that when a deed which is a known source of title, is void upon its face, the defence of a purchase without notice is of necessity excluded. It is unnecessary and, perhaps, would be inexpedient to dwell further upon these topics, but we shall be understood, and expect to be believed, when we say that it is not from any private or selfish motives that we anxiously desire that the decision which we have now pronounced, shall be confirmed; and hence it is that we have not shrunk from the labor of placing the members of the higher court, to which this cause will doubtless be carried, in full possession of the reasons by which we have been governed.

II. We pass to the next objection to the validity of the assignment, and the last which it will be necessary to consider. It is, that by the terms of the instrument, the assignee, D. Leavitt, is enabled to apply the partnership assets to the satisfaction of debts due to him, not from the firm only, but from either of the partners, thus giving to him an unlawful and fraudulent preference as a creditor of the partners, individually, over the creditors of the firm. It is not pretended that this provision, without extrinsic proof, would render the assignment void upon its face. It is not asserted that it is in itself conclusive evidence

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of a fraudulent intent, but, on the contrary, it has been very properly admitted, that if no debts were owing to the assignee, from either of the partners individually, at the time of the execution and delivery of the assignment, this provision is simply nugatory, and no more affects the construction and effect of the instrument, than if it had never been inserted. It is, however, contended that a large debt—exceeding \$20,000, was due to the assignee from one of the partners, J. W. Leavitt, individually, and that this fact, by giving effect to the objectionable provision, completes the evidence of a fraudulent intent, which vitiates the assignment.

We shall first state the principles of law upon which the objection is founded, and then advert so far as may be necessary to the facts as they appear in the evidence.

It is an established, and a very just and reasonable doctrine, that when a partnership becomes insolvent, all its assets, using the term in its largest sense, must be applied exclusively, in the first instance, to the payment of the partnership debts, so as to confine the remedy of the separate creditors of each partner, to the share of their debtors in the surplus that may remain after the debts of the firm shall have been satisfied. It follows that where, by a preference given to separate creditors in an assignment of partnership property, the priority of the partnership creditors is sought to be defeated, they have an unquestionable title to relief in a Court of Equity, but the principle upon which relief is to be granted, and the nature and extent of the relief itself, will be found to depend upon the construction which the law gives to the instrument of assignment. If the provision giving the preference must be regarded as evidence of an intent to defraud creditors, within the true meaning of the Statute of frauds, it is a necessary consequence that the instrument is wholly void and may be set aside, as in all other cases which the Statute reaches, at the instance of judgment creditors who, by setting it aside, will acquire to themselves a prior right to the satisfaction of their debts out of the property assigned; but if the provision, as not implying a statutory fraud, is to be construed merely as an infringement of the equitable rights of the partnership creditors, although as illegal, it is void, yet it is only in a suit in the name and on behalf of the creditors whose rights as a class are affected, that the illegality can be declared; nor will the construction or validity of the whole instrument be any further altered than the protection of their rights may require. It is the latter construction that we adopt as the most reasonable in itself, and by which alone the rights of the partnership creditors can be effectually protected. The whole doctrine in relation to their rights has not yet been stated, and it is the entire doctrine that must be borne in mind, in determining the nature of the relief to which partnership creditors, where an assignment prejudicial to their interests has been made, are entitled. The doctrine of Equity is, not only that the partnership property and assets are a trust fund out of which the partnership debts are to be first paid, but that in the distribution of the fund, these debts without regard to the form of the securities, not constituting an actual lien, held by the creditors, are to be rateably paid. (*Hutchinson v. Smith*, 7 Paige 26, Story Eq.

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Jur.,) and consequently where this trust fund is to be secured for the benefit of the creditors to whom it equitably belongs, this proportional equality amongst themselves, is just as necessary to be preserved, as their priority over the separate creditors of the individual partners; and it is manifest that it can only be preserved, by holding that they alone are entitled to impeach an assignment which violates their rights by attempting to misapply the fund to which their equity as a class had attached. It is evident, that it is only by a decree in such a suit, that the fund can be properly secured and properly distributed. If a judgment creditor can obtain a decree setting aside an assignment of partnership property as void under the Statute upon the sole ground of a preference which it gives to creditors of individual partners, the effect of his decree, is the satisfaction of his judgment out of the property assigned, and he obtains this satisfaction, when the whole property is insufficient to discharge the partnership debts, at the expense of the very creditors whose rights the court in giving him a decree, affects to vindicate, and whose equitable title to the whole fund, had attached as a vested right before his judgment was recovered. That such a decree would be inequitable and unjust, it seems impossible to doubt: and a construction which tends to this injustice, if we are not otherwise compelled to adopt it, we are bound to reject. When it is stated that a preference given to creditors of an individual partner is illegal, it is admitted that the equity which it violates, the equity of the partnership creditors, that the property assigned shall be considered as a trust fund for their joint and equal benefit, existed and had attached when the assignment was made, and this prior equity is just as certainly violated by a preference, subsequently given to a judgment creditor, as by the preference given in the assignment. It is a preference, however, to which the judgment creditor is certainly entitled if that given in the assignment, must be considered as evidence of a fraud, rendering the instrument void under the Statute. On the other hand, by considering the illegal preference, not as a statutory fraud, but simply as a violation of an equitable right, a construction may in all cases be given to the assignment, by which the rights of the partnership creditors will be fully protected, and the distribution according to the rules of equity, of the fund to which they are entitled, be secured and enforced. If the assignment giving a preference to debts due from the partners individually, contains a general trust for the partnership creditors, it is plain, that the favorite objects of a Court of Equity, the security and equal distribution of the fund are at once obtained by holding the trust to be valid and the preference only to be void. But when the assignment devotes the whole property to the exclusive payment of separate debts, the illegality which runs through all its provisions, of necessity vitiates the entire instrument, yet to permit a judgment creditor to set it aside in a suit prosecuted by him solely on his own behalf, would be just as inequitable as to annul for his benefit an express trust, when such a trust is created, and this injustice can only be prevented by holding that the suit for setting aside the assignment, must be brought in behalf of all the partnership creditors, so as to enable the court by its decree, not only to forbid the

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intended misapplication of the property, but to appropriate and apply it, according to its own rules, to the use of those to whom it equitably belongs.

It has indeed been doubted, whether a partnership creditor, who has not obtained a judgment, can maintain a suit to prevent a misapplication of the partnership property, even when the firm is admitted or proved to be insolvent; but the doubt has been resolved, and we think properly and wisely resolved, by the decision of Chancellor Walworth, in the case of *Innes v. Lansing*, (7 Paige, 583.) It was decided in this case, that such a suit was maintainable by a general creditor of an insolvent partnership, and the partners were accordingly restrained by an injunction from receiving or disposing of the assets of the firm. It is true, that the partnership was special, but we entirely agree with Mr. Justice Edmonds, *Dillon v. Horne*, (5 How. Pra. Rep. 35,) that this circumstance creates no material distinction, and that the principle of the decision is just as applicable to a general, as to a special, partnership. When the partnership becomes insolvent, all its assets are converted into a trust fund for the payment of all its debts, just as certainly, in the one case, as in the other. In both cases, the trust arises as soon as the insolvency exists, and no reason is perceived why a creditor, who is a *cestui que* trust has not an immediate right, as in every other case of a *trust*, to invoke the aid of the court so far as the protection of his interests may require. It is the existence of the trust that gives a title to the remedy, and it would be a legal solecism to say, that when a trust is admitted or established, the aid of a Court of Equity, if necessary to enforce its execution, can be withheld; and it is manifest that the necessity for this aid is never more stringent than when a malversation of the property or fund, which the trust embraces, is attempted or threatened.

It is true that the act of partners, who attempt by an assignment to divert the partnership property and assets from their just and primary application to the payment of partnership debts, as unconscientious and unjust, may, without violence, be termed a fraud, but it by no means follows, that it is such a fraud as the statute contemplates, so as to require any other construction to be given to the act than such as the protection of those whose rights it violates may render necessary. The fraud which the statute contemplates, affects all the creditors to whom a preference is not given, and it consists in the intent of the debtor, manifested by the provisions of the instrument, or by extrinsic proof, either to withdraw the property assigned, wholly or in part, from its just application to the payment of his debts, or by retaining a control over it by himself or his trustees, to coerce his creditors into such a settlement, as with a view to his own advantage, he may dictate, (*Gronor v. Wakeman*, 11 Wend. 207,) but it is plain that no such fraudulent intent exists in the mind of partners, who devote their whole property absolutely and unconditionally to the payment of their debts, and commit no other wrong than that of giving to some of their creditors a preference, which the law forbids. It is true, that where a preference is given, it may in one sense be termed an intentional fraud upon those creditors to whom it is denied, since its effect may be to exclude them from any share whatever in the proceeds of

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the assignment, and thus entail upon them the loss of their entire demands. But if the possibility or probability of this consequence were regarded as evidence of an intentional fraud, within the meaning of the statute, no assignment in which a preference is given would be permitted to stand. The statute would condemn them all, since in all cases where a preference is given, the consequence of a resulting loss to the creditors postponed, is possible, in nearly all it is probable, and in many it is known to the parties, that a loss even total must ensue. Yet even this certainty is not permitted to affect the validity of the assignment, when the preference is given by individual debtors to individual creditors, or by partners to the creditors of the firm. The conclusion is necessary and obvious, that the law, by allowing preferences in any case, has in effect declared that they involve no fraud which the statute prohibits, and it is therefore certain that in those cases in which they are illegal, they are rendered so, not by the operation of the statute, but by the force and application of an independent rule of law. The distinction as to the effect of an illegal clause or provision as contravening a statute or a rule of the common law, is established and familiar. In the first case, the taint of the illegality spreads over and corrupts the entire instrument; in the second, it is limited to the particular clause, leaving the instrument, in other respects, as valid and sound as if that clause had never been inserted.

We pass to a brief examination of the few cases to be found in the books which have any bearing upon the question we have discussed. Few as they are, they are not easy to be reconciled; yet if we mistake not there is a decided weight of authority in support of the positions that we have taken. The earliest case in which the question seems to have been agitated is *Grover v. Wakeman*, 4 Paige, p. 23 in Ed. 11, Wend. 272. One of the grounds upon which an assignment which made by partners of partnership property was assailed as fraudulent, was a preference given to a debt alleged to be a private debt of one of the partners. The chancellor being strongly convinced that the assignment was void upon other grounds, declined to give an opinion upon the question, which he stated as doubtful and important, whether such a preference as illegal is simply void, or renders invalid the whole assignment, and in the Court of Errors, Mr. J. Sutherland, for the same reasons, followed his example. Mr. Justice Edmonds, however, who was then a member of the court, as a senator, expressed with much clearness and force, the opinion that the preference was not evidence of an intentional fraud vitiating the assignment, but if void at all, was only so as inconsistent with the equitable doctrine which makes the assets of a partnership the primary fund for the payment of its debts. He embraced in his remarks some of the topics upon which we have insisted. The question was next raised in *Hutchinson v. Smith* (7 Paige 26), but the case cannot be said to have turned on its decision. It was then held by Chancellor Walworth that the debt to which a preference had been given was in reality a partnership debt, but he also held that if the debt had been a separate debt of one of the partners, the assignment would only have been so far void as it provided for its payment.

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This cannot be regarded as a mere *obiterdictum*. The question had now been twice argued before him and he had doubtless been led to bestow upon it an attentive consideration. It is therefore probable that the opinion which he expressed was the result of his mature reflections and it shows that the doubt, which he evidently felt in *Grover v. Wakeman*, no longer existed.

The most recent case is *Kirby v. Schoonmaker*, 3 Bar. Ch. R. 46, and as the whole controversy turned upon the question, we have now an express and positive decision. The bill was filed by a judgment creditor of a partnership to set aside an assignment of all its effects, upon the single objection, that it gave a preference in payment to those debts, which, upon its face, were due from the partners individually.

The chancellor stated the question to be whether the preference was evidence of an intent to defraud creditors, which of necessity, by avoiding the assignment, would entitle the plaintiff to relief, or whether it was only to be regarded as a violation of the equitable rights of the partnership creditors, as a class, remarking that, upon the latter supposition, it was only upon a bill in behalf of all those creditors that relief could be granted. He then examined the question of fraudulent intent, and arriving at the conclusion that it could not be deduced from the provisions of the assignment, he sustained it and dismissed the bill.

The next case, *Washburn v. Bank of Bellows Falls*, 19. Ver. R., 279, has no authoritative force as a precedent, but as a decision of the Sup. Court of Vermont, reversing a decree of the chancellor of that state, it is entitled to much consideration and respect. The opinion of Mr. Justice Redfield, who delivered the judgment of the court, is in no ordinary degree perspicuous and able. He examines preceding cases with skill and judgment, and the reasoning which leads him to his conclusions, commands our fullest assent. The case was not that of an assignment by insolvent partners, yet it involves the whole doctrine of the relative rights and remedies of partnership and separate creditors. The defendants, as separate creditors of one or more of the partners of an insolvent firm, had issued attachments which had been levied upon the partnership property and effects, and the plaintiffs, as partnership creditors, had subsequently attached the same property. It seems that by the law of Vermont attaching creditors are entitled to be paid in the order in which their attachments are levied, and hence the plaintiffs seem to have been driven to the necessity of filing their bill, in order to secure the priority to which as partnership creditors they were entitled. The bill was, however, very properly filed by them, not only in their own names, but on behalf of all the partnership creditors, and it prayed that the defendants might be restrained by injunction from any further proceedings upon their attachments, and that all the property attached should be sold under the order and by the direction of the court, and the proceeds be applied, in the first instance, to the payment of the partnership debts, claiming themselves, however, a preference over the other partnership creditors, by virtue of their own attachments. The court granted substantially the relief that was sought, but holding that the plain-

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tiffs had gained no preference by their attachments, directed them to be paid *pari passu* with the other creditors of the firm. The partnership debts were to be first paid, but were to be rateably paid, and thus the doctrine of equity in relation to the rights of partnership creditors, priority over other creditors, equality among themselves, was carried into effect in its whole extent. It is needless to say how entirely this decision corresponds with the views we have expressed and to which we had been led by our previous reflections and research.

So far there is an entire harmony in the cases, but the concert is broken by the two we shall next cite, which are those upon which the plaintiff's counsel relied. In *Robb v. Stevens*, (1 Clarke, Ch. R., p. 192), the bill was filed by some of the general creditors of an insolvent firm, to set aside, or be otherwise relieved against as an assignment of the partnership property, in which the partners had given a preference to separate creditors, and the Vice Chancellor of the 8th Circuit dismissed the bill, upon the ground, that such a bill could only be filed by a judgment creditor, after the return of an execution unsatisfied. The learned judge seems to have placed this decision upon the ground that the doctrine of Equity, that partnership assets must be applied, in preference, to the payment of partnership debts, is only true as between the parties themselves, and that the partnership creditors can only take advantage of the rule, to reach the property through the equity, and therefore, with the consent, of an injured or dissatisfied partner. But we wholly dissent from a doctrine, which, if admitted to be true, would prove that when the partnership assets are diverted to the payment of the separate debts of an individual partner, by a concurrent act of all the partners, the partnership creditors are without remedy, in law or in equity. It is true that the doctrine derives much support from the language of text writers and, in some cases, of judges, but it is wrong in principle and is inconsistent with numerous cases. Indeed the falsity of the doctrine is implied in every case in which the question as to the effect of a provision in an assignment made by all the partners, giving a preference to separate creditors, has been raised, for unless there is an equity, belonging to partnership creditors, which such a preference violates, wholly independent of that which subsists between the partners themselves, it is plain that no such question could have arisen. The preference, if there is no independent equitable right which it infringes, is perfectly legal. The next case, *Jackson v. Cornell*, (1 Sand., Ch. R., 346), is the only one that has created any difficulty in our own minds, for in this, the Vice Chancellor of this circuit certainly decided that an illegal preference, as an intentional fraud, vitiated the entire assignment. But it is to be observed that the assignment in this case was made by an individual partner of his separate property, and that the illegal provision was a preference given to partnership creditors over the separate creditors of the assignor. Now it is true, that in equity, the separate property of a partner is considered as the primary fund for the payment of his separate debts, just as the partnership property for those of the firm, but we know not that the separate property of a partner, even when he is insolvent, has ever been considered as a trust fund, which, as such, chancery can reach and ad-

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minister, and if not, perhaps, the Vice Chancellor could not have relieved the separate creditors by any other decree than that which he pronounced. It is true that if the assignment contained a general trust for the separate creditors, he might have protected their interests by upholding the trust, and holding the preference alone to be void, but to this question, it is evident, from his opinion, that his attention was not at all directed. At any rate, this decision, if it is really in conflict with that of the Chancellor in *Kirby v. Schoonmaker*, must be considered as overruled.

Our conclusion is, that the objection to the validity of the assignment founded on the application, which it authorizes, of partnership assets to the payment of debts due from the partners individually, to a preferred creditor, is groundless in law, and that, admitting that the authority so given as illegal, was a fraud upon the partnership creditors as a body, still the plaintiffs, who sue only as judgment creditors, have upon this ground no title to relief.

Having arrived at this conclusion, it is unnecessary to examine in detail, the remaining questions connected with this branch of the case; since, if we have now made a right decision, these questions are wholly immaterial, but as we may have erred, and it may be thought desirable by the parties, that our views upon these questions should be expressed, we shall proceed briefly to state them.

It is certain that when the assignment was made, J. W. Leavitt was personally indebted to the defendant, D. Leavitt, in the principal sum of \$19,000, secured, in addition to his bond, by two separate mortgages, one of \$15,000 upon a house and lot in Barclay-st., and one of \$4,000 upon his house and farm at Weehawken, in New Jersey; but it is also certain, and not denied, that this debt was in its origin a partnership debt, and arose from monies which D. Leavitt had from time to time advanced to the firm, and which had been used by the firm in its proper business. It is a mistake to suppose that a partnership debt, although resting in simple contract, is merged and extinguished when a higher security is taken from an individual partner. On the contrary, the presumption of law is, that the new security was intended to be collateral, and this presumption can only be repelled by positive proof that it was accepted by the creditor in full satisfaction of the existing debt.

We have considerable doubts whether the necessary proof of such an acceptance by D. Leavitt has been given, but we incline to think that the surrender by him of the notes of the firm, would be deemed sufficient in a court of law, and be held to have extinguished the prior debt. But we are very clearly of opinion, that although it may have been satisfied in law, it was still a subsisting partnership debt in equity, and by this, we mean, that not only a moral obligation to pay the debt still rested upon the conscience of the partners, but that a Court of Equity, in distributing the assets of the partnership, would have been bound to acknowledge its validity, and enforce its payment. Upon this point, the decision of Lord Thurlow, in *ex-parte Clures*, (2 Brown's Ch. R. 595,) and that of Chancellor Walworth, in *Hutchinson v. Smith*, (1 Paige, 26,) seem to us very applicable and decisive authorities. In each of these cases, a single partner only

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was known to the creditor as his debtor, and there was no privity of contract whatever between him and the firm, and the debt was held to be a partnership debt only, upon the facts that the money, with the knowledge and consent of the partners, had been applied to the use of the firm, and had not been repaid. If there is any real distinction between these cases and the present, we are unable to state it.

Lastly.—Upon the supposition that the debt had ceased to be a partnership debt, in equity as well as in law, we are of opinion that the peculiar circumstances of the case repel any inference of a fraudulent intent; that is, of any intent that the debt should be paid out of the partnership property to the prejudice of the partnership creditors. The securities which D. Leavitt held from J. W. Leavitt, were not given up, nor meant to be given up, when the assignment was made, and if the debt, in the full sense of the term, was the private debt of J. W. Leavitt, these securities were the primary fund for its payment, and until this fund was exhausted, D. Leavitt, even under the terms of the assignment, could have no recourse to the partnership property that was assigned to him. He could look to that property only for a deficiency, and there is no reason whatever to suppose that a deficiency was anticipated. The mortgages was doubtless considered by the parties an ample security for the debt, and that they were so, is proved by the event, for not only has the entire debt been satisfied from the mortgaged property, but a surplus of \$700 resulting from the sale of the N. J. farm has been credited by D. Leavitt, upon the debt due to him from the firm. In the result, more than \$20,000, arising from the separate property of J. W. Leavitt, has been applied to the reduction of partnership debts, so that, in reality, it is only his separate creditors, if there are any, not those of the partnership, who have any ground of complaint.

In concluding this opinion we renew the expression of our regret that we are not able to extend that relief to the partnership creditors, to which upon principles of equity, had the system of preferences not been unfortunately established, they would be clearly entitled. Setting aside the special provisions in these assignments in favor of D. Leavitt and Howland & Aspinwall we would willingly, had we the power, sustain and enforce the general trust for the creditors of the firm and by so doing convert all the partnership property and effects into a trust fund for the payment rateably of the partnership debts. But we have felt that in order to give effect to our own wishes, we could not listen to objections to which we are persuaded, no countenance could have ever been given, in any court of justice, had preferences never been allowed, but which if permitted to prevail, would render void the most honest disposition of his property that a debtor in failing circumstances can possibly make, namely, its conveyance to trustees for the equal benefit of all his creditors. Had such conveyances alone been sanctioned by the law, that extreme jealousy of insolvent assignments, which is so strongly manifested in the more recent decisions in this state would never have arisen, nor would there be any reason to fear that this jealousy was leading to a revival of the exploded and arbitrary doctrine of constructive fraud. For ourselves, so long as we shall be permitted to act in the exercise of

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our own judgment, we shall follow the rule that the statute prescribes in its plain and obvious sense; and shall never declare an assignment of property made by an insolvent debtor to be void, unless we are satisfied that the fraudulent intent which the statute requires to be proved, existed as a fact; not merely as one of those conclusions which judges formerly were accustomed, but are now forbid to draw.

In the present case, it is our deliberate judgment that no fraudulent intent affecting the validity of the assignment can be deduced either from the proofs or from the provisions of the instruments.

It was suggested upon the hearing that in the event of our sustaining the assignments, the defendants might be required to account as trustees, and a decree for that purpose be now made, but it was settled by the Court of Errors in *Cunningham v. Freeborne*, 11 Wend. 241, that upon a creditor's bill, in the ordinary form, no such decree can be made. It was indeed said by Ch. J. Nelson, that where the bill is framed with a double aspect, that is with a prayer in the alternative for an account, the relief may be granted, but he also remarked that in such a case, all the creditors, for whose benefit the trust has been created, are necessary parties and the bill must be filed in their behalf, not merely in the names of the judgment creditors. Here both the alternative prayer and the necessary parties are wanting.

The bill must therefore be dismissed with costs.

N. Y. Supreme Court.

[February Special Term.]

Before MITCHELL, Justice.

DAVID A. BOKER, &c., Appellant, against DAVID BANKS, &c., survivor,
Respondent.

CODE—COSTS ON APPEAL FROM A JUDGMENT RENDERED IN A SUIT PENDING
1st July, 1848.

On an appeal to the Court of Appeals, from a judgment rendered in a suit pending on the 1st of July, 1848, the costs are to be taxed under the code, and not under the Revised Statutes. See, as to the same point, *Kanouse v. Martin*, (2 Sand., Superior Court Reports, 739.) Per Judge Ingraham, N. Y. Common Pleas, *Ward*, survivor, &c., v. *Syme*, and others, M. S., 18th March, 1851.
But see, also, *Doty v. Brown*, (4 Howard's Practice Reports, 429, *contra*.)

Motion for a relaxation of costs on an appeal made to the Court of Appeals in 1849, on a judgment rendered in a suit pending on the 1st July, 1848.

E. C. Gray, for appellants.

Wm. S. Sears, for respondents.

 Punch on Special Pleading.

MITCHELL, J.—The appeal was taken in 1849, and judgment affirmed; and the question is, whether costs are to be taxed in the Court of Appeals, under the Revised Statutes, or under the code.

The Revised Statutes have no provision carrying a cause from the Supreme Court by appeal, but by writ of error, and the costs are based on the assumption that the mode of proceeding is by that writ.

In the code, § 457; writs of error are forbidden after the code of 1849 took effect; and it was declared, that whenever a right then existed to have a review of a judgment rendered before 1st of July, 1848, still, such a review could only be had upon an appeal taken in the *manner* provided by the code. This was not in the code of 1848, and under that act former judgments were reviewed by writ of error.

But under this § 457 of 1849, the remedy is by appeal, and under the code. The appeal is to be taken in the *manner* provided in the code, and is therefore to be prosecuted according to the code, one of the results of which naturally is, that the costs should be governed by the code, the only system that applies to such cases.

This is also the practice here as adopted. This rule would not apply when the proceeding was by writ of error. Then we must assume the proceedings to be under the former system.

 PUNCH ON SPECIAL PLEADING.

THE DECLARATION CONTINUED.

The pleadings now commence, which were originally delivered orally by the parties themselves, in open court, when success might depend on length of tongue; but the parties themselves being got rid of, in the modern practice, and the lawyers coming in to represent them, success usually depends on length of purse. The object of pleading, whether oral or written, is to bring the parties to an issue; which means literally a way out; but in practice, the effect of getting plaintiff and defendant to an issue, is to let them both regularly in.

Almost all pleas, except those of the simplest kind, must be signed by a barrister, who does not usually draw the plea, but he merely draws the half guinea for the use of his name. The pleading begins with the declaration, in which the plaintiff is supposed to state the cause of action; but in which he gives an exaggerated account of his grievances, that not more than one-tenth of what he states is to be believed. For example, if A. has had his nose slightly pulled by B., the former proceeds to say, that "the defendant, with force and arms, and with great force and violence, seized, laid hold of, pulled, plucked and tore, and with his fists, gave and struck a great many violent blows and strokes, on and about divers parts of the plaintiff's nose."

 TO CORRESPONDENTS.

We have received the 2d volume of Sanford's Superior Court Reports, containing some most able decisions; also, Mr. Waterman's valuable Digest of American Cases in Equity, reviews of which will appear in our next.

* Chitty on pleading, Vol. II., p. 605.

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NEW-YORK, MAY, 1851.

[MONTHLY PART.

H. S. District Court.

[*Southern District of New-York.*]

Before the Honorable ANDREW J. JUDSON, District Judge.

IN THE MATTER OF THE RETURN ON THE PETITION OF NICHOLAS VEREMAITRE, GEORGE DENHAM, AND FRANCOISE BERNARD, CITIZENS OF THE FRENCH REPUBLIC.—HABEAS CORPUS—SURRENDER OF FUGITIVES FROM JUSTICE UNDER THE TREATY WITH FRANCE—JURISDICTION.

Upon a writ of habeas corpus the court cannot look beyond the colorable authority of the judge who issued the warrant. The court will merely look into the Sheriff's return containing the warrant; and if the court finds that the officer had jurisdiction of the process and assumed to take proof upon the issuing the same, which proof be adjudged to be sufficient, it will not review his adjudication upon the question nor undertake to say whether he erred in adjudging the proof sufficient.

If the Court thinks that the warrant is *prima facie* sufficient, that is, as far as it will go on *habeas corpus*.

THE facts are fully detailed in the opinion of the court.

A. R. Dyett, and H. D. Lapaugh, for the Prisoners.

F. R. Tillou and J. Prescott Hall, U. S. District Attorney for the United States.

JUDSON, J.—The original petition for this writ was filed in this court on the 14th day of December, 1850, was allowed on that day, and the trial thereof was ordered for the 16th. The writ is in the usual form, supported by the proper oath, and on the 16th day of December, 1850, William Edmonds, to whom the said writ was directed, as Warden of the city prison of the city and county of New-York, made return of said writ, bringing with him into court the three persons now in his custody by virtue of three warrants of commitments, two of which are from the Court of General Sessions in and for the city and county of New-York, signed by the proper clerk thereof, the first containing an order to imprison, keep, and hold the said Nicholas and George, charged with the crime of bringing into the State of New-York stolen goods, knowing them to be such, a crime against the laws of New-York; and the other warrant commanding the said William Edmonds to hold in custody the said Francois Bernard as a

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witness, to give evidence in the cause therein named, the said Francoise having failed to give the proper bail for her appearance as a witness; the former bearing date the 11th day of December, 1850, and the latter, on the 13th day of said December, 1850. The return further states, that the said Nicholas, George and Francoise are also in his custody and keeping, as warden as aforesaid, by virtue of another warrant granted by J. W. Metcalf, United States commissioner, in the following words, to wit:—

“ United States of America :

To the Marshal of the United States for the Southern district of New-York, and to his Deputies, or to any of them.

Whereas, a warrant was issued by me on the sixteenth November, 1850, for the apprehension of George Denham, alias Frederick Cole, Nicholas Veremaitre and Francoise Bernard, persons found within the limits of the State of New-York, charged with having committed within the jurisdiction of the republic of France, to wit, in the city of Paris, the crime of *vol qualife crime*, one of the crimes enumerated and provided for in the treaty of extradition between that government and the United States; and whereas, the said persons having been brought before me, and the evidence of their criminality having been heard and considered, the evidence was deemed sufficient by me to sustain the charge under the provisions of the said treaty. Now then, you are hereby commanded to keep the said George Denham, alias Frederick Cole, Nicholas Veremaitre and Francoise Bernard, in safe custody, in the proper jail, until they shall be surrendered on the requisition of the proper authority to such person or persons as shall be authorized, in the name and on the behalf of the said republic of France, to take charge of them for the purpose of returning them to the territories of the said republic. Witness my hand and seal, this sixth day of December, 1850, and of the Independence of the United States the seventy-eighth. (Signed)

J. W. METCALF, United States Commissioner.”

The object of this writ, is to procure the discharge of these prisoners. The petitioners have been fully heard in support of their rights, by learned counsel, and the cause having been deferred for consideration until the twenty-third day of December, 1850, when the prisoners are again brought into court, and thereupon it is ruled by this court as follows:—Upon this return, there are two important questions involved, as important as any which can be suggested to our minds—they regard not only the civil liberty of men, the code of criminal law, and treaty stipulations, but also in what manner the same shall be administered. The questions which arise upon the two warrants issuing out of the State courts are passed over; and I proceed directly to consider the main question which has been the subject of discussion here. This is the warrant of the United States Commissioner, upon the inquiry which has been had before him, on the demand of the republic of France, wherein these three persons were charged with the commission of a crime in France, which, as that government claims, is a crime falling within the provisions of the treaty between

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the United States and France. From this warrant, it appears that a hearing was had before the commissioner, and that he deemed the evidence sufficient to sustain the charge and thereupon the warrant in question was issued. Accompanying this return of the writ, on the day of the trial, and during its progress, there was also laid before the court, a warrant of extradition, granted by the Hon. Daniel Webster, Secretary of State, under his hand and seal of office, dated ———, founded on the proceedings of the Commissioner, directing and ordering that the said Nicholas, George, and Francoise, be surrendered to the Consul General of France, as fugitives from justice. This document is made a part of the case, and the question now is, shall these prisoners be discharged, or shall the *habeas corpus* be dismissed, and the prisoners left subject to the warrants in the hands of now the public officers? The first treaty with France was concluded on the 9th day of November, 1843, and provided for the surrender of those who were charged with murder, comprehending the crimes designated in the French penal code, by the terms assassination, parricide, infanticide, and poisoning, attempt to commit murder, rape, forgery, arson, or embezzlement. This being found inadequate to cover all the crimes perpetrated in both governments, on the 24th day of November, 1845, an additional treaty was concluded, embracing other crimes, in these words, "the crime of robbery, defining the same to be the felonious and forcible taking from the person, of another, of goods or money to any value, by violence or putting him in fear; and the crime of burglary defining the same to be, the breaking and entering by night into a mansion-house of another, with intent to commit felony; and the corresponding crimes included under the French law, in the words *vol qualifié crime*, not being embraced in the second article of the convention of extradition, concluded with France, in 1843." The warrant of the Commissioner on the face of it is a *prime facie* compliance with the terms of the treaty, and from the face of the warrant of the Secretary of State it also appears, that the proceedings and findings of the Commissioner were duly returned to the office of the Secretary of State, according to the act of Congress of the United States, entitled, "An Act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders," passed on the 12th day of August, 1848. The first section of that act gives jurisdiction to a United States Commissioner, upon complaint made on oath, and he is to issue his warrant for the apprehension of persons charged with offences under the provisions of a treaty; and if, on hearing the evidence, he shall deem the same sufficient to sustain the charge, then such Commissioner shall certify the same to the Secretary of State, and issue his warrant to commit to jail until the surrender shall be made by the Secretary of State. On a minute examination of all the proceedings in this case, it appears, from the face of the papers now returned, that the provisions of the act of Congress have been strictly complied with. The first point made by the learned counsel, in opposition to the legality of this proceeding, is, that there has been no crime committed by either of these persons in custody, which will justify the extra-

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dition commanded in the warrant of the Secretary of State, and it is insisted that the terms "*vol qualifié crime*" are descriptive of no specific crime whatever, and therefore the counsel insist upon the right of going behind the present finding and warrant of the Commissioner, and show, by testimony, that no such crime has been committed as falls within the treaty. The writ of *habeas corpus* has been long in use as a writ of right. It is a judicial writ, confided to the legal discretion of the courts, to whom its jurisdiction has been imparted. The great principles by which the courts are governed, in the proceedings on this writ, are as well settled, and perhaps better settled, than those applicable to any other department of the law. Among these principles, we find the legality or illegality of the imprisonment is to be determined by the return, or in other words, on the face of the papers of the case. The argument in support of this writ would apply with great force to an appeal, but there is a difference, well settled, between an appeal and this writ. In one case the facts are re-examined, but in the other the law is applied to the facts already found. In determining this case, we are to consider, first, whether the Commissioner had jurisdiction of the subject matter. The law of Congress, before referred to, confers this jurisdiction in express terms. He is to hear the evidence, and if he deems it sufficient to sustain the charge, the warrant issues. No language can be more explicit, and, from the purport of that language, the jurisdiction is not only given, but it is exclusive. Then the next inquiry is, how can this court go behind the finding of any tribunal having exclusive jurisdiction, for the purpose of reviewing the facts? This question has been so well and so long settled, that there is no room for doubt. 7 Wheaton 38, *ex parte Kenedy*.—In this case the Supreme Court said: "This court can do nothing where a person is in execution by the judgment of a court having a competent jurisdiction; this court is not a Court of Appeal." 1 Dal. 135, *Gregory v. Story*.—"When, on the face of the return it appears that the justice exceeded his jurisdiction, then a *habeas corpus* lies." 1 Ashmead 10—Rush J. said: "On *habeas corpus*, it is not competent for one court to inquire into the regularity of the proceedings of another." 3 McLane 89, *Johnson v. the United States*.—"On a *habeas corpus*, the court cannot look behind the sentence of the court where it has jurisdiction." In Jacob's Law Dictionary, title *habeas corpus*, we find the following laid down, in early times, as the criterion:—"This it is which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, that the court, upon *habeas corpus*, may examine into its validity." 3 Barb. 37, *Wiles v. Brown*.—"Where a Supreme Court Commissioner has become possessed of jurisdiction of the subject matter and of the parties, the law clothes him with judicial powers, and in analogy to other proceedings, his decisions cannot be impeached in a collateral way." 1 Barber 140, *in the matter of Prime and others*.—"Upon a writ of *habeas corpus*, the court cannot look beyond the colorable authority of the judge who issued the warrant. The court will merely look into the Sheriff's return containing the warrant; and if the court finds that the officer had jurisdiction of the process, and assumed to take proof upon the

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issuing of the same, which proof he adjudged to be sufficient, it will not review his adjudication upon that question, nor undertake to say whether he erred in adjudging the proof sufficient. If the court thinks that the warrant is *prima facie* sufficient, that is as far as the court will go on *habeas corpus*." The counsel in support of this writ, have cited 4 Cranch 75, *ex parte Bollman and Swartwout*. On reading that case, it will be seen that there was a writ of *habeas corpus* to bring up the bodies, and a *certiorari* to bring up the record. It appeared there, that there was no allegation where the crime of treason was committed; neither was it stated in the warrant, before what court the trial was to be had, and on the face of the warrant there was no sufficient statement that the court in the District of Columbia had any jurisdiction of the cause. These authorities are conclusive, that we cannot go behind the proceedings of the Commissioner's warrant in this case; and these authorities will apply in all cases of courts or magistrates having exclusive jurisdiction of the subject matter, except where fraud or forgery have been practised, as in the case of the *L'Amistad*, 14 Peters, 518. These authorities are conclusive on this point, and yet the importance of the case will be my apology for giving a further illustration, by alluding to a proceeding which has become familiar to all the States, and which was the foundation of all the treaties recently made for the restoration of fugitives from justice. The 2d section of the 4th Article of the constitution of the United States, provides that, when "A person charged, in any State, with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Then comes the act of Congress of '93, which provides that, when such demand is made, there shall be produced a copy of an indictment found, or an affidavit made before a magistrate charging the person with the crime, certified as authentic by the Governor, making the demand. On deeming these authentic, it shall be the duty of the Governor, upon whom the demand is made, to cause the person accused to be arrested and delivered up. Now, suppose a person commits the crime of burglary in Rhode Island, and flees to the State of New York—the Grand Jury of Rhode Island find their bill of indictment, which is certified by the Governor of Rhode Island to be authentic, and demands the surrender of the man charged with the offence, what has the Governor of New York to do? He is to examine the evidence of authenticity; and on finding the same properly certified, he has but one duty to perform—to arrest and surrender the prisoner. Here is an opportunity for the *habeas corpus* to review the decision of the Governor, upon which his warrant of arrest issued; and it is proposed to go behind the warrant of surrender, and inquire into the evidence received and considered by the Governor, with the addition, if you please, of other testimony, to show that no such crime has been committed as has been charged in the indictment. A *habeas corpus*, in such cause, accompanied by a proposition to review the cause in this manner, would strike every one as absurd. No such thing can be done in that case—all will admit that. The practice,

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since 1793, has been uniform, that, on *habeas corpus*, you cannot go behind the Governor's warrant, when he surrenders a fugitive from justice. Should there be any statutory provision that the trial of this judicial writ should take place before a jury, this would only increase the absurdity. To witness a Governor's finding and decision reviewed and re-examined by a jury of twelve men, would be so singular and ridiculous that any stranger would pronounce it a farce. In principle there is no difference between that case, and one for the same purpose, under the treaty. It has been argued further, that even if we are confined to what appears on the face of the return, still the prisoners should be discharged, for the reason that, upon the face of the Commissioner's warrant, it does not appear that any offence has been committed in France, called "*vol qualifié crime*"—in short, that there is no such offence in France as "*vol qualifié crime*." An ingenious criticism has been applied to the warrant of the Commissioner, and that of the Secretary of State, as to the meaning of the French term, "*vol qualifié crime*," used in the treaty, and what should be the proper interpretation of the terms as used in the treaty. This is a technical objection, which cannot apply to proceedings on *habeas corpus*, for in such proceedings the substance is to be regarded, and not the mere form. It substantially appears on the face of these warrants, that a crime embraced within the French treaty, has been the subject of evidence before the Commissioners. And if it does in substance so appear, that is sufficient. In these proceedings on *habeas corpus*, all that can be required, is a substantial allegation that the offence has been committed in the country from whence the demand is made. And so far as I am able to understand the translation of those terms of the treaty, they imply the commission of an extensive larceny, attached to which is an infamous punishment, like confinement to hard labor. We cannot shut our eyes against various efforts to legislate this writ of *habeas corpus* into such a machine as may answer some favorite purpose with the popular voice, and wherever we find such legislation, it will be seen that the utility of the process is much impaired. The unnatural lumber thus attached to its original and simple frame-work, only serves to embarrass and retard its usefulness. The writ is judicial, and secured to citizens by the constitution. It cannot be suspended except in time of war, and yet it may be so tinkered, changed, and altered, that the framers of the constitution would hardly recognise its existence. But it is to be hoped that, in Congress at least, the ancient writ of *habeas corpus* may be retained as an efficient and important right of the citizen, in its simple and long established mode of trial. Should Congress go seriously to work in so reforming the judicial system, as to order all the judicial writs known to the common law, such as writs of error, *habeas corpus*, mandamus and quo warranto to be tried and determined by jury, the civilized world might well be astonished. There is no danger of any such pretended reform in that quarter. Upon that part of the *habeas corpus* which shows that these prisoners are held in custody on the warrant of the United States Commissioner, and embraced in the warrant of extradition from the Secretary of State, it is ruled that the *habeas corpus* be dismissed. There is

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still another part of the return, which shows that the prisoners are held by two warrants of commitment from the Court of General Sessions of the city and county of New York. Those were the first in order, but according to the views which are entertained by the court, it is quite immaterial which branch of the case is first determined. In regard to these commitments, I take this occasion to say, that I do not entertain jurisdiction of this writ on their behalf. There is no occasion for any United States Court to express an opinion, at this day, that we can discharge any prisoner who is held and imprisoned under State authority, or by virtue of a warrant issued by any State court. This is wholly beyond the jurisdiction of the District Court of the United States. It is a principle acknowledged by all well informed citizens, that the line of jurisdiction between national and State jurisdiction should be so strongly marked, that every court shall abide by that line. To prevent all conflict of jurisdiction there should be no encroachment on either side. Situated as the States are, in relation to the general government, the first step of encroachment or conflict should be avoided. Let this be the rule, and all will be safe and harmonious. Such will be the order on this writ of *habeas corpus*. This is deemed the true course, if we consult original principles or decided cases. I shall leave the State authorities and their warrants where they are found by this writ, presuming that the State authorities will be quite as ready to remove out of the way of treaty stipulations, all obstructions, as the courts of the United States themselves. The State courts are in no want of knowledge that a treaty is the highest law of the land, the constitution only excepted, and that the States are as much bound by treaties which exist, as Congress itself, and we are not to suppose for a moment that any State will thrust obstacles in the way of their execution. In support of these views, I will refer to the following cases. In the present case it is understood that his honor, Judge Edmonds, on this principle, has refused to entertain the *habeas corpus* brought before him, by these prisoners, and the case was there dismissed. The correctness of that decision is apparent. It has been argued here, on the other point in controversy, that this writ is often brought to relieve persons who belong to the army or navy of the United States, but nothing was contained in the argument as to the proper tribunal. It may be assumed as correct, that in all cases where the imprisonment is under the authority of the United States, the courts of the United States only have jurisdiction of the writ of *habeas corpus*; and in all cases where the imprisonment is under State process or authority, the State tribunals alone have jurisdiction. 9 Johnson, 239 *Jeremiah Ferguson's case*. The great principle settled in this case is, "that a State court has no jurisdiction of *habeas corpus*, to discharge a soldier of the United States army." Kent, Chief Justice, gave the opinion of the court in that case, and I quote here the substance of his opinion. This is the language of that learned judge:—"My conclusion is, that it would not only be unfit for the Court to interpose in this case, so long as the courts and judges of the United States have ample and perfect jurisdiction over the whole subject matter, but that it would be exercising power without any jurisdiction." It will not diminish the weight of

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this authority, when it is stated that the late Mr. Justice Thompson, then a member of the Supreme Court of New York, concurred in the opinion expressed by Chief Justice Kent, and enforced his own opinion in language equally strong. Two such minds rarely occupy the same bench together, and although many years have passed away, still the authority remains unshaken. I rest upon it with entire confidence, knowing, too, that no other rule can be adopted, without bringing the United States authorities into conflict with the State authorities. I know full well, that during the war of 1812, there were instances where the *habeas corpus* was brought before a State judge, to discharge an enlisted soldier from the army; but when we know, too, that these small proceedings were countenanced more from an opposition to the war, than from the principles of law, they will cease to influence our minds. I am constrained to say that those proceedings were so palpably erroneous, that they can never be urged as authoritative decisions. If the State courts can discharge a soldier from the army, or a sailor from the navy, on *habeas corpus*, then the United States courts and United States judges may exercise the similar jurisdiction over the militia of the States in time of peace. Here is a man, subject to military duty in Maryland, and a fine is imposed on him for neglect of duty, or for contempt or disobedience of orders while on duty, and he is imprisoned by a warrant from his commanding officer. Now, I will ask, whether it would be either lawful or expedient that a judge of the United States should discharge that person on *habeas corpus*? No, this could not be done; it never will be attempted; and yet, where is the difference between the two cases? There is none. Further to illustrate my position, we may suppose, under the tax system, in any one of the States, on refusal to pay a tax, the person is committed on a tax warrant from a State justice, can a judge of the United States discharge the individual on *habeas corpus*? Surely not. There is no jurisdiction. It is a State matter altogether. So, on the other hand, where the proceeding is under any law of the United States, the jurisdiction belongs exclusively to the officers of the United States. The exercise of these powers, in the manner stated, will secure peace, while any assumption of power upon either side, will be the source of discord, disastrous to the country. The final order of the Court is, that the *habeas corpus* be dismissed—that portion of it which embraces the return of the warrants from the Court of Sessions—for want of jurisdiction over the subject matter; and the other portion, embracing the warrant of the Commissioner, for the reasons already stated, leaving the warrant of extradition, from the Secretary of State, in the hands of the Marshal, no way affected or impaired by this writ.

Before the Hon. Saml. R. Betts and the Hon. A. T. Judson.

ONE HOUR RULE.

DEC. 23.—At a stated term of the District Court of New York, held this day, it was

Ordered, That no counsel will be permitted to speak in the argu-

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ment of any cause in the Court, more than one hour, without the special leave of the court granted before the argument begins.

—This rule to take effect on and after the first day of the next term, the first Tuesday of January, 1851.

Court of Appeals.

(State of New-York.)

Before BRONSON, Ch. J., and all the rest of the Judges.

DAVID SELDEN, *Appellant*, agst. ANDREW S. GARR, *Respondent*.

LIBEL.

An action of libel cannot be maintained upon an affidavit used to oppose a special motion, or in the regular course of any other judicial proceeding, if the affidavit so used was pertinent to the matter in issue.

A motion was made to strike out a part of a notice subjoined to the general issue, in an action of assumpsit, brought by an attorney for services. The part of the notice sought to be expunged, contained an allegation that the services for which the suit was brought, were rendered in so careless, negligent, unskilful, undue and improper mode and manner, as to be abortive and valueless. The defendant's affidavit to oppose the motion, stated that the plaintiff had revealed confidential communications made to him in his professional capacity in the transaction of a portion of the business for his services in which the suit was brought. Held that the defendant's affidavit was pertinent to the issue on the motion, and therefore that an action of libel could not be maintained upon it.

The question, whether the affidavit was pertinent to the issue on the motion, is a question of law, and the demurrer to the declaration did not therefore admit the averment that it was impertinent.

Demurrer to Declaration.—The action was for a libel. The declaration alleged that the plaintiff was an Attorney and Counsellor at Law, and Solicitor in Chancery—that having been concerned in the prosecution of divers suits, &c., for the defendant, Selden, and one Richards, upon their retainer, he commenced an action in this court against them for the recovery of moneys claimed by the plaintiff to be due from them to him for his work, labor and services as such attorney, counsellor and solicitor, in and about the prosecution of those suits, &c.; that the defendant and said Richards pleaded the general issue in the said action, and annexed thereto a notice of special matter, a part of which are in these words:

And these defendants will further prove on the trial of this cause, that the said counsel conducted the prosecution and defence of the several suits, and attended to the other professional services of attorney, solicitor and counsellor in the said declaration mentioned, in so careless, negligent, unskilful, *undue and improper mode and manner*, as to render such professional services, and every part thereof, wholly abortive, and of no value to the said defendant.

That the plaintiff made a motion to the court to strike out that part of the notice as false and slanderous; that in opposition to said motion, the defendant, Selden, made an affidavit, and read and published the same in open court, on the hearing thereof, and placed the

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same on the files of the court, containing, among other things, the following *irrelevant, impertinent*, false, slanderous, defamatory and libellous matter, to wit:—"David Selden, one of the said defendants, deposes and says, that the said plaintiff revealed and disclosed confidential communications which deponent had made to said Garr, as the attorney of the deponent and said Richards, relative to a portion of the professional business for which this suit is brought. And that said Garr revealed said communications for the purpose of aiding, assisting and abetting an individual who had an interest adverse to the deponent and said Richards. That said Garr combined and colluded with that individual to devise plans to injure deponent and said Richards, and prejudice their pecuniary and other rights. And deponent means to be understood, that said Garr made use of and revealed the said confidential communications, as one of the means by which he and the said individual were to accomplish the said object; and that the said Garr has grossly violated his duty to the deponent and said Richards, in the transaction of the said litigations and business."

To this declaration the defendant demurred, and assigned the following causes of demurrer:—1. That it does not appear that the libel was ever *published*. 2. That the declaration charges *no specific* offence against the defendant. 3. That the affidavit alleged to be libellous was part of a *judicial proceeding*, and was *relevant* and *pertinent* thereto. 4. That it does not appear by the declaration that the matter alleged to be libellous, was published with *malice*, nor that it was *false*, nor that it was not *pertinent* and *relevant*. 5. That the affidavit was a *privileged communication*, and cannot by any possibility be a libel. 6. That the plaintiff's only remedy is by a *special* action on the case in the nature of an action for malicious prosecution, in which the absence of probable cause must be alleged.

The cause came on for argument before the General Term of the Supreme Court of the City of New-York, when the court held that to impute to a professional man ignorance or want of skill in a particular transaction, was not actionable. To be actionable, words of that character must be spoken or written of him generally; that it is not so, however, of words which impute want of integrity; they are actionable, whether used generally of his profession or particularly as to some one transaction. That the words in this case impute want of integrity, and are actionable, *per se*.

It is averred that they are pertinent to the matter in hand, and therefore privileged. But in the meantime, the complaint avers that they were used maliciously, and were not pertinent. If so, they are not privileged, by actionable; and we cannot hold, as the demurrer claims, that these words thus used maliciously, and not pertinent, are not actionable.

The demurrer was overruled, with leave to amend, on payment of costs. The plaintiff perfected judgment.

From this decision the defendant appealed.

P. Y. Cutler, in support of the appeal.

I. The writing complained of as libellous, is plainly a privileged communication.

1. It was an affidavit used upon a motion, in the regular course of a judicial proceeding.

2. The questions of negligence, *impropriety and general unfitness and lack of duty*, were in issue on that motion. It is not revealing confidential communications *improper*. If so, then

3. The facts stated in the affidavit were all pertinent to the issue on that motion. (*Hoar v. Wood*, 3 Metcalf, 197; *Hastings v. Lusk*, 22 Wend., 410;) and the question, whether pertinent or not, is a question of law for the court. (*Suydam v. Maffatt*, 1 Sand. Sup. Court Reports, 489; *Torry v. Field*, 10 Vernt. Rep., 413, 414; see, also, 353, *Tyler v. Tillotson*, 2 Hill, 507; and cases cited. *Cooper v. Stone*, 2 Denio, 292.)

4. All this appears from the declaration itself. It therefore furnishes an absolute exemption from liability in an action of libel. (23 Wend., 410; *Astley v. Young*, 2 Burrows, 807.)

5. "No action lies for any allegation, pleading or other matter, published in the usual course of a civil or criminal proceeding in a court of justice," (23 Wend., 29, 30; 1 Starkie on Slander, chap. 10.) "of publications made in the course of parliamentary or judicial proceedings." (Page 212, at top, 239 in margin; see particularly page 21 Wend. 319; *Cutler v. Dixon*, 4 Coke, 14 C., and the notes to Thomas & Frazer, ed. *Astley v. Youngs*, 2 Burr., 807; *Doyle v. O'Donoherty*, 1 Carr. & Marsh, 418, 41 E. Com. Law, 230; *Gilbert v. The People*, 1 Denio, 41; 1 Sanders' Rep., 131, in notes; Stark. on Slander, by Wend., 219; see, also, Preliminary Discourse, page 135-137.)

II. The plaintiff should have brought a special action on the case, in the nature of an action for malicious prosecution, averring that the matter alleged to be false and malicious, was stated *without reasonable or probable cause*. The *absence of probable cause* must, in such a case be distinctly averred, (*O'Donohue v. McGowen*, 23 Wend., 30; 1 Stark. on Sland., by Wend., p. 245 to 256; *Hodgson v. Scarlett*, 1 Barn. & Ald., p. 232, and see note 245, 1 S. R., 493; *Johnstone v. Sutton*, *Flint v. Pike*, 4 Barn. & Cress., 473; *Hastings v. Lusk*, 23 Wend., 410; opinion of Chan., *Howard v. Thompson*, 21 Wend., 325; *Rex v. Baillie*, 2 Esp. Dig., 506; 2 ed., by Gould, Banks & Co., 1811; Holt on Libels, Am. Ed. of 1818, p. 184; Starkie on Slander, 182 to 194; Am. Eds. of 1826, and the cases there cited; Bac. Abr. Sland. E. 4, Serg. & Rawle, 426; 2 Wills 304, *Remington v. Congdon*, 2 Pickering 313, 314.

III. There is no sufficient averment of publication. It is alleged, generally, that the defendant published, but immediately afterwards, the declaration sets forth how it was published specifically. Where there are two averments of the same facts in a pleading, the one general and the other special, the latter controls. The specific averment shows, that the affidavit was merely read on the argument of the motion, and put on the files of the court. That was no legal publication. (2 Starkie, 14, *Rex v. Baillie*, Esp. Dig. 506; *Lake v. King*, 1 Saunders, 131; Bac. Abr., Libel B., 2 Hawk, P. C. ch. 72, § 15.) This is a question of law. (2 Starkie on Sland.; 17, note 32,

Starkie on Evidence, Tit.) Law and fact, (*Baldwin v. Elphinstone*, Blk. Rep., 1037.)

IV. The words in this declaration are not actionable, because they impute to the plaintiff lack of diligence, &c., only in the particular and specified business which he transacted in the suits that he conducted for the defendants, and not to him generally.

To impute ignorance to an attorney or counsellor in a particular cause, or want of skill in a physician in relation to the disease of a particular patient, is not actionable. (*Tobias v. Hart*, 4 Wend., 541.)

The words are therefore not actionable, *per se*, and to make them so, special damage as the loss of a particular client must be averred.

V. There is no allegation of special damage in the declaration, and therefore the plaintiff cannot recover. (*Tobias v. Hart*, 4 Wend., 541.)

If the plaintiff has sustained any damage, he must state it, for it is an established rule, that no evidence shall be received of any loss or injury which the plaintiff has sustained by the speaking of the words, unless it be specifically stated in the declaration. (*Craft v. Boit*, Saunders' Rep., 243, d. and note 5, ed. of 1846.)

A. S. Garr, in reply.

I. The declaration in the court below sufficiently alleges a *publication* of the matter complained of as libellous.

The declaration charges that the defendant "composed and published, and caused to be composed, and read and published in open court, upon the hearing of the motion, and placed upon the files of the said court in the form of an affidavit, purporting to be made by him in the said action," the libel in question. And yet the defendant states as one of the causes of demurrer, that "it does not appear in the said declaration that the said alleged libel was ever published."

II. The declaration charges a specific offence against the defendant, inasmuch as it charges express *malice*, and that the libellous matter was *false*, as well as *irrelevant* and *impertinent* to the occasion upon which it was published.

III. That the affidavit alleged to be libellous was not relevant and pertinent to the occasion, appears upon its face.

The affidavit was made and read, for the *ostensible* purpose of resisting an application to strike out, as false, that part of a notice of set-off and special matter, which alleged that the professional services of the plaintiff, to recover compensation for which the suit was brought, had been performed "in so careless, negligent, unskilful, undue and improper manner, as to render them, and every part of them, wholly abortive, and of no value to the defendants." But the affidavit, instead of asserting the truth of that allegation, (in which case it would have been relevant and pertinent,) alleges matter wholly foreign to it, viz: that the plaintiff had combined with a third person to injure the defendants, and had, by one of the means by which he and such third person were to accomplish, made use of, and revealed confidential communications which the defendant had made to the plaintiff in his professional capacity. Now, supposing that these ac-

cusations had been true, they were, nevertheless, *immaterial*, as respected the only question then before the court which was the truth or falsity of the allegation in the notice, inasmuch as they did not tend to show either carelessness or unskilfulness in the prosecution and defence of the defendant's suits, or that the professional services of the plaintiff had been of no value to the defendants.

IV. The privilege of parties, in respect to words or writing used in the course of judicial proceedings, is *limited* to matter which is *pertinent* and *material* to the controversy. (Cooke on Defamation, 60, 62; 2 Greenleaf on Evid., § 422, p. 341; 2 of 2d ed., *Gilbert v. The People*, 1 Denio, 41, and cases there cited by the court. (*Hoar v. Wood*, 3 Metcalf, 197; *Gardiner v. Tappan*, 1 Hammond, 38; *State v. Burnham*, 9 N. H. Rep., 34; Broom's Legal Maxims, 150, &c.; Bell's Principles of the Law of Scotland, art. 2048, 2049, 2051, p. 571, of 3d edition; 3 Bl. Comm., 29, 125.

V. The charges against the plaintiff, contained in the affidavit, are libellous and actionable, because they were published in relation to his profession and office, and impute to him a *want of integrity*. *Riggs v. Denniston*, 3 Johns Cas. 196; *Ostrum v. Calkins*, 5 Wend., 263.

VI. Although the affidavit was made and published under circumstances which would have rendered it privileged, if material and pertinent to the occasion, (because, in that case, the presumption of malice would have been excluded.) Yet, as malice is expressly alleged in the declaration, and admitted by the demurrer, it cannot be deemed a privileged communication. (*Gilbert v. The People*, 1 Denio, 41; *Lathrop v. Hyde*, 25 Wend., 448.

When a communication that would otherwise be privileged, is made *maliciously*, and without probable cause, the *pretence* under which it is made *aggravates* the case, and an action lies. (E. Kent's Com. 22, Per Best. J., in *Fairman v. Ives*, 5 B. & Ald., 642; *Woodward v. Lander*, 6 Carr. & P. 548.

VII. Where the declaration charges the defendant with *falsehood* and *malice*, the defence that the alleged libel was a privileged communication, can be availed of only by *plea*, either of the general issue, or else special, *denying* the allegation that the publication was false and malicious. (Per Cowen, J., in *O'Donoghue v. McGowen*, 23 Wend., 30, 33, Per Walworth, C., in *Hastings v. Lusk*, 22 Wend. 416; Bull, N. P., 10; Saunders on Pleading and Evid., 801.

VIII. The plaintiff has declared, specially setting forth the facts, and showing that the publication was *prima facie* privileged; but averring that it was impertinent to the occasion, and was false and malicious. Whether the action be denominated an action for a *libel*, or a *special action on the case*, in the nature of an action for *malicious prosecution*, is immaterial. It is an action *on the case*, inasmuch as the plaintiff's whole case or cause of complaint is set forth at length in the declaration. (Bl. Comm. 122.)

It will scarcely be denied, that the charges contained in the affidavit are libellous and actionable, *if* the occasion upon which they were made did not warrant their publication. But the declaration alleges, and the demurrer admits, that the occasion was *not* such as

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to warrant the publication. The declaration alleges, that the defendant, *under pretext* of resisting a motion to strike out, as false, a portion of a notice of special matter, *maliciously* composed, read and published in open court, in the form of an affidavit, matter *defamatory* of the plaintiff, that was *irrelevant, impertinent* and *false*. If that allegation be true, (and its truth is admitted by the demurrer,) how can it be pretended that the plaintiff has not a good and sufficient cause of action?

To reverse the judgment of the Supreme Court, and give judgment in favor of the defendant, on his demurrer, would be to overrule the case of *Gilbert v. The People*, 1 Denio, 41. The court there decided that the privilege to parties, and those who represent them, is limited to matter that is pertinent and material to the controversy; and that in an indictment against an attorney, who had transcended that limit, and had written and published in the form of a declaration in a civil action, charges and insinuations injurious to the reputation of the prosecutor, the allegation that those charges and insinuations were false and malicious, was *admitted by the demurrer*, and, not being pertinent to the action, were libellous.

Presuming that the doctrine laid down in that case will be sustained by this court, I feel confident that the judgment given by the Supreme Court upon the demurrer in this cause, will be affirmed with costs.

HURLBUT, J., delivering the opinion of the court:—The declaration shows that the plaintiff, exercising the profession of an attorney, counsellor and solicitor, had transacted considerable business for the defendant and another, and not receiving satisfaction, had instituted a suit in the Supreme Court against them, to recover compensation for such services; in which suit the defendants had pleaded the general issue, and given notice that they would prove on the trial "that the plaintiff conducted the prosecution and defence of the several suits, and attended to the other professional business of attorney, &c., in the declaration mentioned, in so careless, negligent, unskilful, undue and improper mode and manner, as to render such professional services, and every part thereof, wholly abortive, and of no value to the defendants." The plaintiff moved the court at special term to strike out this part of the notice as false and scandalous; and the defendant, in resisting the motion read in open court, and placed on its files an affidavit made by him in the action, containing the libellous matter complained of, and which the plaintiff charges is false and malicious.

This affidavit stated that the plaintiff had revealed confidential communications made to him in his professional capacity by the defendant, in respect to a portion of the business entrusted to the former, to receive compensation for services in which the action in the Supreme Court was brought; and that the plaintiff thus betrayed the defendant's confidence for the purpose of assisting another person, who had an interest adverse to the defendant, and that the plaintiff combined and colluded with that person to devise plans to injure the defendant, and prejudice his pecuniary interests in the business before

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named ; and that the plaintiff thus grossly violated his duty in conducting the litigation and business committed to his care. These are the material facts in the case, as recited in the declaration, to which the defendant demurred ; and the question thus presented, is, whether the declaration contains a cause of action ? The defendant insists, that on the plaintiff's own showing, it appears that he was privileged, as a party to a suit, to make, read, and place on the files of the court, the affidavit referred to, which contained matter relevant and material to the motion which it was used to resist. The Supreme Court decided against him, on the ground that the declaration charged the libel to be malicious and impertinent, without determining as matter of law, whether or not the substance of the affidavit was pertinent to the motion in opposition to which it was read and filed. Upon this question, the decision of this case must rest ; for, if the matter of the affidavit were pertinent or material to the motion, the law will not allow its truth or innocency to be drawn in question in an action for libel. It would not, in that case, be necessary to deny malice, as the law does not permit a party to allege in this form of action, that the publication was false or malicious. This appears to be sound in principle, and to be supported by authority. (2 *Samuel Pl. & Ev.* 801, 2 ; *Starkie on Slander*, chap. 10 ; *Gilbert v. The People*, 1 *Denio*, R. 41.

Looking then to the issue which was presented by the motion, to strike out a part of the defendant's notice, we find that he had alleged that the plaintiff's services were of no value, by reason of their having been rendered in a careless, negligent, unskilful, undue and improper manner. The plaintiff moved against this allegation as false, and the defendant endeavored to verify it. The notice may have been insufficient as a pleading, being quite vague and general in its statement of the defence ; but it, nevertheless, alleged that, which, if made out by evidence of particular facts, would have constituted a good defence against the whole, or a part of the plaintiff's claim. The plaintiff raised no question as to its sufficiency, but objected against it as false, and by his motion invited the defendant to verify it if he could. I do not doubt that, if the defendant had affirmed its truth by an affidavit, in terms as general as those employed in the notice, that such an affidavit must have been regarded as relevant and material to the motion. Instead, however, of such a general affirmation of the truth of the notice, the defendant swore to a particular fact, to wit : that the plaintiff had improperly disclosed the confidential communications referred to, that he had thus violated professional duty and confidence, and worked a pecuniary injury to the defendant while conducting his business. This may not have tended to establish the truth of the entire notice, but it went to verify that part of it which alleged improper and injurious professional conduct on the part of the plaintiff, and hence was pertinent to the matter before the court. The publication must, therefore, be regarded as privileged upon the facts set forth in the declaration, and the judgment of the Supreme Court must be reversed.

N. Y. Superior Court.

(City of New-York.)

Before OAKLEY, Chief Justice, and SANDFORD and PAINE, Justices.

EDWARD ROBERTS v. JESSE F. RANDELL.

February Term, 1851.

CLAIM AND DELIVERY OF PERSONAL PROPERTY—ORDER OF ARREST.

The provisional remedy for the claim and delivery of personal property, under the code, cannot be maintained against a party who had not, in fact, or in law, the possession or control of the property claimed at the time the action is commenced.

Nor can an order for arrest under the sub-division of Sec. 179 of the code be made, except where a party has such a possession.

The facts sufficiently appear in the opinion of the court.

E. Fitch Smith, for plaintiff.

D. Gould, for defendant.

By the Court.—SANDFORD, J.—This is an appeal from an order made at Chambers, discharging an order for the arrest of the defendant made under the third sub-division of section one hundred and seventy-nine of the code of procedure. The defendant had been arrested under the order, and imprisoned for default of bail. The action was brought in form for the recovery of the possession of personal property. The plaintiff, claiming a delivery of the property, placed in the hands of the sheriff an affidavit and a requisition for its delivery pursuant to sections 207 and 208 of the code, with the proper security. The sheriff certified that the property had been concealed, removed or disposed of, so that he could not find or take it. Thereupon, the Justice at Chambers made the order for the defendant's arrest. The plaintiff's affidavits for the delivery and for the arrest, showed that the action was brought for the conversion of a bond of the State of Texas, which was delivered by the plaintiff to the defendant as a broker, to sell for not less than forty per cent. on the amount of principal and interest, and which the defendant, some months prior to the suit, sold for forty per cent. on the amount of the principal only. That the plaintiff, thereupon, demanded of him the bond itself, and also the amount of it at the price limited for its sales; neither of which demands were complied with by the defendant. The affidavits further alleged, that the bond was obtained by the defendants, with the fraudulent intent to convert it to his own use. After his arrest, the defendant offered to give to the sheriff the bail for his appearance; but the sheriff required the undertaking prescribed in section 111 of the code.

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The first question arising on this appeal, is whether the plaintiff can bring an action "to recover the possession of personal property" in a case like this. By his own showing, the defendant parted with the property long before the suit was commenced; and whatever it may be called, the suit is really one to recover damages for the conversion of the property. We have examined the subject with much care, and are clearly of opinion that the plaintiff is not entitled to the remedy which he claimed, and which was granted to him by the order at Chambers.

That order is one of the "provisional remedies," established by the seventh title of the code. The claim and delivery of personal property, is itself one of those provisional remedies, and the order in question is consequent upon the failure of that remedy. Arrest of the party, is provided by the title cited in five classes of cases. The first embraces, among others, actions for the recovery of damages for wrongfully taking, detaining, or converting property. This, beyond dispute, applies to the plaintiff's cause of action here. The third class is thus expressed, "In an action to recover the possession of personal property unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff," (Code, § 179, subd., 1, 3.) The bail required in the first class, is for appearance to answer the process of the court; that required in the third class, is virtually for the payment of the judgment which may be recovered in the action. It is evident, that in all cases arising under the third sub-division, the plaintiff may claim an arrest and bail under the first, which gives the arrest in an action for wrongfully detaining property. But to obtain the arrest and security provided by the third sub-division, besides the unjust detention, it must be shown that the property sought to be recovered has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff. In this clause, we find the real distinction between the two kinds of arrest. The first is given in suits for *damages*, claimed for the wrongful taking or detaining of property. The second is given in suits where the party seeks the recovery of the *identical property* itself. Such a suit, in our judgment, can be brought only when the property is in the possession or under the control of the person who is made defendant. To bring an action against John Doe, to recover the possession of goods which the plaintiff knows he has long since sold and delivered to Richard Roe, is idle and unmeaning. This is made more manifest, by the clause already stated on which the whole thing turns. The goods must have been concealed, &c., *so that* the sheriff cannot take them. The words are "has been" removed, &c. Now, although a sale of the property by the defendant, months before the suit, will have the effect to prevent the sheriff from taking the goods from him; we think it quite apparent that such was not the disposal intended by this section. If it were, there would have been no occasion to add the words, "so that it cannot be found or taken by the sheriff." The provision, without those words, would have been complete to reach every case where the defendant had parted with the property illegally taken or detained. The words just quoted, were added to

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qualify the provision, and limit it to cases where the defendant had not only disposed of the property, but had disposed of it so as, and in order to prevent the sheriff from executing the process for its delivery, which could only be after the commencement of the suit, or after the sheriff, by the receipt of the process, was entitled to make such delivery, or when made with a view to defeat expected process, which would be a disposal in fraud of the law. To test this conclusion, let us examine the chapter entitled, "Claim and Delivery of Personal Property," out of which the arrest in question arises. Section 206 enacts that in an action "to recover the possession of personal property," the plaintiff may, when he issues the summons, or at any time before answer, "claim the immediate delivery of such property," as provided in that chapter. Thus the action is to be one, not for *damages* for illegally taking, detaining or converting property, nor for the value of such property; but it is for the recovery of *the possession* of the property itself. To this end, the remedy claimed, is the delivery of the very property which the sheriff cannot do, in a suit against one who has not the thing to be delivered. This distinction between actions to recover damages for the wrongful taking or detaining goods, and actions for the recovery of specific personal property, is maintained in the judgment to be rendered, as well as in process. (Code, § 246, subd. 2.) And if, under section 206, an action to recover the possession of personal property may be brought against one who has sold and delivered it, and has neither the possession nor the control of it; why may not an action to recover the possession of real property, or to recover real property, be brought against any person who once possessed or claimed it, though he has sold his right, and parted with his possession to others? We cannot see how an action can be said to be brought to recover the possession of a specific chattel, when it is brought against a party who avowedly has not the chattel, and from whom no power of the court can procure it.

To return to the code. The affidavit to be made by the plaintiff must state, among other things, "that the property is wrongfully detained by the defendant," and the alleged cause of the detention thereof. (§ 207.) This assumes that the property is in the possession or control of the defendant. It is a detention by him existing at the time the affidavit is made; else, how can the party make oath that it is wrongfully detained *by the defendant*. Then, in executing the process, the sheriff of the county where the property is supposed to be, is required to take it from the defendant, and deliver it to the plaintiff. (§ 208, and see § 211, 214.) Without pursuing minutely the details of the chapter, they all proceed upon the basis of an action against specific property, and are addressed to giving it effect against such property, in the possession of the defendant. The only provision against the defendant's person, is that already commented upon, and is given when through his act the sheriff is prevented from executing the process issued to take the property out of his possession.

Unless we are right in our interpretation of these provisions, we must hold that the legislature has provided two distinct provisional

remedies, in all cases where, under the former system, trespass or trover could be maintained; by one of which the defendant may be held to give the special bail of the old system, and by the other may be required to give security to pay the judgment that may be recovered in the action; and the latter remedy being so much more efficacious than the other, it will, of course, supersede it altogether. It is a remedy, as insisted on in this action, which in all cases of the alleged, wrongful taking or detaining of personal property, will subject defendants who have disposed of the property, however innocently, to imprisonment, from the commencement of the suit until its termination, unless they can give security to pay the judgment sought; and if a judgment be recovered, until they pay it, or are discharged under the insolvent laws.

We cannot be induced to believe that the legislature intended to make such a harsh and violent change in the law, and so inconsistent with the other provisions for arrest contained in the same section, and so totally at variance with the whole tendency of our legislation, for the last twenty years, in respect to imprisonment upon civil process; and we are entirely satisfied that the provisions of the code, construed in their plain and fair import, tend to any such result. We think the remedy contained in subdivision one of the one hundred and seventy-ninth section, was designed for precisely such cases as that of the plaintiff in this suit, and that the stringent provision in the third subdivision, was intended to execute justice upon parties who should attempt to defeat the process of the court in suits to recover specific property, by putting the property out of their hands, and thereby preventing its seizure by the sheriff. A history of the enactment corroborates this opinion. It appears, for the first time, in the amended code of 1849. The bail required in such case in the code of 1848, and in the action of replevin by the revised statutes, was the ordinary special bail that the person of the defendant should be amenable to the process in the action. No change in this respect was proposed by the Commissioners, on practice and pleadings, in 1849, and the change was made by the legislature of that year in the amendments to the code of 1848.

We were referred, by the plaintiff's counsel, to the cases of *Cary v. Hotaling*, and *Olmsted v. Hotaling*, in the late Supreme Court, (1 Hill. 311, 317,) as authority that replevin could be maintained after the party had sold and parted with the goods which he had illegally taken or detained. There is no doubt that the "claim and delivery of personal property," in the code, was intended as a substitute for the provisional relief theretofore obtained in the action of replevin. (Report of Commissioners of Practice, &c., in 1848, page 169.) We have theretofore maturely considered these authorities. The question really controverted in the first case cited was, whether trespass would lie under the circumstances; and in the second, whether a partner who had not participated in the fraud, could be made liable in *tort* with his guilty copartner. It was undoubtedly assumed by the judge who delivered the opinion of the court, that replevin could be maintained in all cases where the party could bring trespass *de bonis asportatis*, but he did not discuss the point, and it does not appear to have been

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presented. The evidence showed that the defendants had sold the goods before the suits were brought, and therefore, the point existed in the case, although it was not noticed. As the law then stood, the only arrest authorized in replevin, was that now provided in the first subdivision of section 179 of the code, and the party could be held to bail with the same effect in trespass. The point was, therefore, of no practical importance.

Was the assumption of the judge, in the cases in 1st Hill, warranted by the law as it then existed?

Previous to the revised statutes replevin could not have been maintained in those cases. Although learned judges, by way of illustration, frequently said before the revised statutes, that replevin would lie wherever trespass could be brought; they did not intend to say that they were concurrent remedies in all cases. Wherever trespass would lie, and the goods were possessed by the defendant, replevin could be maintained; and this was all that those judges intended to assert. The same remark might be made as to most of the instances in which, since the revised statutes, judges have said that replevin would lie wherever the party could maintain trespass or trover. We repeat, that before the revised statutes, there was no such thing in this state as replevin against a party, after he had entirely divested himself of the possession and control of the goods claimed; except in the single case of distress for rent, where the distrainor had proceeded fraudulently or contrary to the statute. Permitting a replevin within five days. (By fraud in the proceedings, we mean some act of the distrainor, analogous to the driving of a distress out of the hundred or shire in England.) The action was purely possessory. It sought the specific goods, and was fruitless unless the goods were seized, or other goods taken from the defendant *in withernam*, in the excepted case just stated, as a substitute for those distrained, on the distrainor having *eloigned* the latter beyond the reach of the sheriff. The judgment was for the property already seized and restored to the plaintiff, with damages for its detention. There was no judgment for its value, or for any other damages. Hence the action always ensued immediately on the taking of the property.

It was even contended, on distresses for rent, (which at that period were the origin of most of the actions of replevin,) that the suit could not be brought after the five days, within which the tenant was permitted to make a replevy, although it was commenced before an actual sale of the distress.

We refer for the state of the action before the revised statutes, to Co. Litt. 145 b. Bacon's Abr., Replevin A.; 2 Dunlap's Pr. 872, 880; Graham's Pr. 55, 726, 1st Ed.; and *Jacob v. King*, 5 Taunt. 451.

The revised statutes extended the action of replevin, to cases where the original taking of goods was lawful and they were wrongfully detained; and it is described to "be brought for the recovery thereof, and for the recovery of damages" for the unjust caption or detention. The form of the writ is prescribed thus: "Whereas, A. B. complains that C. D. has taken, and does unjustly detain (or does unjustly detain, as the case may be);" and it commanded the sheriff, on receiving security for a return of the goods, if a return should be adjudged,

&c., to replevy the goods and deliver them to the plaintiff, and to summon the defendant; and if he could not find the goods, then to take the body of the defendant, &c. The statute next prescribed the manner of executing the writ, by delivering the possession of the property to the plaintiff. (2 R. S. 522, &c., § 1, 6, 8, 10.) "If the property described in the writ, have been removed or concealed so that the sheriff cannot make delivery thereof," he was required to arrest the defendant, who was thereupon to give bail as in personal actions. (Ibid., 11, 12, 22 to 27.) This was a substitute for the *capias in withernam* of the common law, and was extended to all cases of replevin. The declaration (§ 36,) is again carefully limited to a detention existing at the commencement of the suit. The whole statute, without citing it more at large, shows that the action was still a possessory action against personal property, extended to cases where before, even if the goods were in the defendant's custody, trover or detinue were the only remedies.

By the revised statutes several valuable changes were made in the practice in replevin, besides the substitute of the arrest before mentioned among others, a judgment for the value of the property and damages where the plaintiff has not obtained the goods by the replevin. The language of the eleventh section before cited, taken in connection with the nature of the action as declared by the first section and the form of the writ and the declaration, was plainly limited to a removal of the property made to avoid the service of the writ. It seems to us entirely incongruous to make the statute say, when the writ is given only for a present detention, that the party shall be arrested under it, for a disposal of the property made before it was issued. We do not intend to speak of removals in fraud of the law when a writ was expected.

The revisers in proposing the changes in replevin, say it has been extended so as to make it a substitute for *detinue* and a concurrent remedy with trespass and trover in all cases of the unlawful caption or detention of personal property. We suppose the latter expression was used by the revisers, in the same sense that it was before that time used by judges in comparing replevin with trespass, as we have already mentioned.

We do not imagine that the revisers intended to say, that by their proposed change, replevin could be brought against the bailee of a horse, a year after he had sold the horse to a stranger. In fine, we are fully convinced that the revised statutes did not warrant the bringing of replevin in a case like the one before us, and that the assumption to that effect, in the cases cited from 1st Hill, was unfounded.

Such being our conclusion, and all agreeing that the "claim and delivery of personal property" under the code, is a substitute for replevin as it before existed; it fortifies our opinion founded upon the code itself, that the provisional remedy cannot be maintained against a party who has not, in fact or in law, the possession or control of the property claimed.

Some stress was laid on the addition in the code of the words "disposed of," to the removal or concealment mentioned in the

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eleventh section of the revised statutes. We think this was intended to provide for the event of the defendant's selling or otherwise parting with the property in fraud of the action; as for example, after the action was commenced and before service by the sheriff. It cannot be supposed that those words were designed to change the whole nature of the remedy substituted for replevin and to give it a scope vastly wider than its original ever had obtained.

Upon the whole, we entertain no doubt that the plaintiff has misconceived his remedy, and that an order for arrest under the third subdivision of section 179 of the code, cannot be made in a case like this.

The order appealed from must be affirmed. (a)

The six Judges of the Court concurred in this opinion.

Surrogate's Court.

(County of Kings.)

Before the Honorable JESSE C. SMITH, Surrogate.

IN THE MATTER OF PROVING THE LAST WILL AND TESTAMENT OF THOMAS LEWIS, DECEASED,—8th January, 1851.

WITNESSES TO SIGNATURE OF TESTATOR—REQUISITIONS OF THE STATUTE.

Where one of the witnesses to a will had no recollection of what transpired at the execution of the will, except, that he signed his name as a witness, at the request of the testator; and the other witness testified that the testator had the paper lying before him, with the printed or written side next to the table, and a small portion of the face of the paper so turned down, that the witnesses did not see any signature, and only saw a blank piece of paper, on which they signed their names as witnesses, at the request of the testator, and who, at the time, declared the within to be his free will and deed. *Held*, that this was not a sufficient acknowledgment of the subscription of the testator.

When a will is not subscribed in the presence of the witnesses, to prove the acknowledgment of the subscription to the attesting witnesses, there must be evidence sufficient to satisfy the court that the witnesses saw the subscription when the acknowledgment was made.

The facts sufficiently appear in the opinion of the court.

R. Busted and Robert Emmett, for the widow and executors.

Francis B. Cutting, for Joseph B. Lewis.

THE SURROGATE.—In this case, Wm. H. Wing, one of the subscribing witnesses to the will, had no recollection of what occurred on the occasion when he signed his name as a witness to the will, except, that he was called into the private office of the testator, at his store in Pearl Street, New-York, and signed his name, according to the best

(a) The case of *Van Nest v. Conover*, 5 Howards Pr. R. 148, was not known to the Court until after this decision. It would not probably have affected the conclusion to which the Court arrived.

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of his recollection, at the request of the testator. He was unable to state what transpired, and had no recollection that the testator said anything, unless it was to see him sign it, and he could not say positively that he signed it at the time. He had no recollection that Mr. Lewis told him what the paper was, nor did he recollect the conversation at the time.

Ferris Tripp, the other witness, was the bookkeeper of the testator. He testified that Wing and himself were called into the office by the testator, where he had a paper laying before him on his desk; that he turned up so much as would allow them to write their names, requesting them to sign the same with their residences; that the testator also said, "I declare the within to be my free will and deed;" that that was all that was said at the time, as near as he could recollect; that Wing and himself then signed their names as witnesses respectively thereto; and that he did not to a certainty know, at the time, what the paper was.

On his cross-examination he said that no part of the paper was read by the witnesses, unless he read Mr. Wing's name, as it was signed first; and that Mr. Lewis did not read the paper, nor any part of it to him. This witness then took the paper, which was a printed form of a will, on a single sheet of paper, with printing and writing on one side only, and laying it upon the table before the surrogate, with the printed side to the table, he turned down so much of the face of the will at the bottom as would expose the names of the witnesses to the will, and stated that it was laid on the desk, and so folded or laid, that all he saw was blank paper enough to sign the witnesses' names upon; that it was so arranged that he saw no part of the contents, written or printed; and that he did not see the signature of Mr. Lewis; that he saw only the blank space upon which the witnesses' names were written. He further stated that he did not see Mr. Lewis sign the paper; that Mr. Wing, Mr. Lewis and himself, were present, and no one else. He was not certain that Mr. Wing and himself were present at the same time when he signed his name, but thinks they were; and he had a clear and distinct recollection of what was said and done upon the occasion, except upon the matter whether Mr. Wing was present when he signed his name.

The witnesses were both examined at some length by the counsel for the executors and the widow, with an apparent view to impeach their testimony, but nothing was elicited to materially alter the state of facts above set forth.

The will is dated Feb. 2, 1849; is signed and sealed by the testator, and has an attestation clause printed in two lines across the whole sheet, with blanks where the name "Thomas Lewis" and the words "him," "he," "his" and "his" are written in as follows: "The above written instrument was subscribed by the said *Thomas Lewis*, in our presence and acknowledged by *him* to each of us: and *he* at the same time declared the above instrument as subscribed to be *his* last will and testament; and we, at *his* request, have signed our names as witnesses hereto, and written opposite our names our respective places of residence.

It was admitted by the parties that the blanks in the will and at-

Surrogate's Court.—Last Will and Testament of Thomas Lewis.

testation clause were filled in the handwriting of the testator, and that the signature to the will is his.

2. Revised Statutes, page 64, section 40, declares the manner in which every last will and testament of real or personal property shall be executed and attested—

1. It shall be subscribed by the testator at the end thereof.

2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument, so subscribed, to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator. The cases of *Remsen v. Brinkerhoof*, 26 Wen. 325; *Chaffee v. The Baptist Missionary Convention*, 10 Paige 92, and *Doe v. Roe*, 2 Barbour's Sup. Court, Rep. 200, hold that all the several requisites of the statute must be substantially complied with; that a precise and literal compliance is not necessary; that it is not material in what precise order the several acts are done, provided they are all done at the same time, in the presence of the testator and of the witnesses; and that the burden of proving the due execution of the will, lies upon the party seeking to establish it.

There is no dispute in this case that the will is subscribed by the testator at the end, and it appears that the witnesses signed their names at the end of the will at the request of the testator. There is no evidence that the testator signed his name in the presence of the witnesses. One of the witnesses says that he did not sign it in his presence, and the other says that he has no recollection of seeing him sign it. As to the acknowledgment of the subscription, one of the witnesses says that the testator did not do or say anything, except to turn down a bit of white paper from the bottom of the instrument and request the witnesses to sign it with their places of residence, and that he declared the within to be his free will and deed, and the other witness has no recollection that the testator said anything, unless it was to see him sign it.

But it is said by the counsel for the widow and executors, that the will having been filled in the handwriting of the testator and signed by him with the attestation clause also filled in by the testator, it must be presumed that the signature was so subscribed before the witnesses were called upon to sign their names thereto; that the acknowledgment of the subscription may be made by the testator to the witnesses without their seeing the signature of the testator, and that the declaration of the testator that the within was his free will and deed was not only a good and sufficient compliance with the requirements of the 3d subdivision of said 40th section so as to prove the publication, but that it is in connection with the other circumstances of this case an acknowledgment of his subscription to the instrument.

It is not necessary to decide in this case whether if the subscription to the will had been made by the testator in the presence of

the witnesses, or such subscription had been clearly acknowledged to have been so made by him to the witnesses, the declaration that the within was his free will and deed would have been a good publication.

The main question in this case is, was there an acknowledgment of the subscription of the testator to the witnesses? Can the subscription to a will signed by the testator, before the witnesses are called to attest it, and properly declared by the testator to be his last will and testament, be acknowledged to the witnesses without their seeing the signature.

The English statute, 1 Victoria, 26, sec. 9, in reference to the execution of wills, has followed almost precisely the phraseology of our revised statutes, except that it does not require a publication. The will must be signed at the foot or end thereof, and such signature must be made or acknowledged by the testator in the presence of two or more witnesses present, at the same time, and such witnesses shall attest or shall subscribe the will in the presence of the testator.

Several decisions under the statute reported in the 1st, 2d and 3d volumes of Curteis Ecclesiastical Reports, have been cited by the Counsel for the heirs of the deceased, who oppose the probate of the will to show the current of decisions in England under the provisions of the statute of Victoria, so like the provisions of our own statutes.

In the case of *Ilott v. Genge*, 3 Curteis, Rep. 160, the testator folded the paper so as to conceal its contents and his own signature, and requested the witnesses to sign their names upon it.

Sir Herbert Jenner Fust in that case, held that it was not a compliance with the statute, which required the signature of the testator to be acknowledged. "How is it possible," he asks, "that a signature should be acknowledged, for it is not the will, but the signature which is to be acknowledged, unless the signature is exhibited to the witness. The statute requires that the signature should be acknowledged, not, as Mr. Jarman says, the will," and he decided that the signature was not acknowledged either expressly or virtually in the presence of two witnesses present at the same time, and he pronounced against the validity of the will, and decreed administration. On the other hand, the case of *Blake v. Knight*, 3 Curteis, 547, also decided by Sir Herbert Jenner Fust, subsequent to the case last above stated, has been cited by the counsel for the will, to show that the signature to a will may be acknowledged by the testator, though the witnesses are not able to testify that they saw it, and by an acknowledgment by the testator that the paper is his will. But upon examination of this latter case, it will be found that Sir Herbert Jenner Fust referring to the case of *Ilott v. Genge*, 2 Curteis, 160, says, "that case was, in my opinion, a case under very different circumstances from the present. In that case the object of the testator was to conceal his signature (if it was there at the time) from the witnesses. The greatest pains were taken to conceal from them what the paper was. Here everything was done in the most open manner."

The statute Victoria 1 requires that the *signature* should be acknowledged by the testator. Our statute says that the *subscription* must be acknowledged, and that too as a separate and distinct act from the declaration that it is a will.

If, under the English Act, which requires no publication, a declaration that it was the will of the testator, was insufficient as an acknowledgment of his signature, for a much stronger reason would the same declaration be insufficient, under our statute, which requires a declaration that it is the will of the testator, in addition to the acknowledgment of his subscription. Under our statute the declaration might be taken, or intended for a publication. While under the English statute it could not be taken, or intended for anything, unless it was as an acknowledgment of the signature.

I have examined the authorities in England cited by the counsel for the widow and executors so far as I have had an opportunity to do so. The most of those cases, however, are decisions upon the statute of Frauds of Charles II., and are mainly inapplicable to the cases arising under our revised statutes and under the statute of Victoria I.

Each case decided in our own courts has, to a considerable extent, rested upon its own circumstances; some general principles have indeed been laid down and considered as established, but no case has been reported which presents the question whether an acknowledgment of the subscription of the testator, can be made to the witnesses without their seeing the signature, and whether a declaration that the paper is his free will and deed, without exhibiting the signature, is a good acknowledgment. We are therefore left to determine this case upon its own circumstances, upon the statute, and upon general principles fairly applicable thereto.

With a desire to satisfy myself if possible, that the provisions of the statute, in reference to the acknowledgment of the subscription by the testator, have been substantially complied with in this case, I have examined with some care all the authorities referred to by the counsel on argument, and which I have been able to find on this subject, and yet I am compelled to the conclusion, if the testimony of the witness, Tripp, is to be believed, that there is no proof in this case, that the will was signed by the testator in the presence of the witnesses, and that there is not sufficient proof that the testator acknowledged such subscription to have been made by him to the witnesses.

But it is said by counsel for the executors and widow, that the testimony of the witness, Tripp, should be rejected as unworthy of belief; that the will having been prepared by the deceased, and signed by him and the witnesses with an attestation clause, showing a compliance with all the requirements of the statute, the will must be presumed to have been properly executed in the absence of any affirmative proof to the contrary. It is a sufficient answer to this view of the case, that I do not consider the testimony of that witness as unworthy of belief. If, however, I did, I do not understand the authorities cited by the counsel for the widow and executors, to hold that a will drawn by the testator, and signed by him and the witnesses, with a proper attestation clause, also drawn by the testator,

made but two years before the will is offered for probate, where both the witnesses are living in this state, fully competent to testify, and are called as witnesses and examined, but cannot recollect anything that was done on the occasion, except that they signed their names as witnesses, can be sustained upon the negative testimony of the want of recollection of the witnesses.

In the case of *Chaffee v. The Baptist Missionary Convention*, the Chancellor says in effect, that a proper attestation clause, showing that all the statute formalities have been complied with, is presumptive evidence of the fact *in case of the death of the witnesses, or where from lapse of time they cannot recollect what did take place.*

In the case of *Remsen v. Brinkerhoff*, 26 Wen., 325, Senator Verplanck, does indeed say that the proved or acknowledged signatures of witnesses to a will, bearing above their names an attestation of the requirements of the statute, would be good *presumptive* evidence of an actual compliance with such requirements. But the presumption in that case was rebutted by the testimony of the subscribing witness, that they did not read the declaratory clause. In the case under consideration the attestation clause was not read, and therefore there could be no presumption in favor of the acknowledgment of the signatures arising from that clause.

It is to be remarked in this connection, that the circumstance, that the testator, Mr. Lewis, requested the witnesses to sign their names, with their places of residence, is but very slight evidence that he himself knew all the requirements of the statute. See the marginal note to the case of *Remsen v. Brinkerhoff*, 25 Wen., 325.

It is also further to be noticed, that in the case of *Chaffee v. The Baptist Missionary Convention*, 10 Paige, 85, where the testator at the time of the execution of the will, in presence of the witnesses, placed his finger on his name subscribed at the end of the will, and acknowledged that it was his last will and testament, but there was no evidence that he subscribed it in the presence of the attesting witnesses, or that he acknowledged in their presence that such subscription was made by him, or by his direction, or in his presence; it was held by the court that this was not a sufficient acknowledgment of the subscription.

It is not necessary, in the view which I take of this case, to determine whether the publication of this will was sufficient. In my opinion there is not sufficient proof that the subscription of the testator to this will was made in the presence of the witnesses, nor that such subscription was acknowledged to have been so made by him to the witnesses.

My decision, therefore, is, that the instrument offered for probate as the last will and testament of Thomas Lewis, deceased, for want of proper execution, is not a valid will of real or personal property.

REVIEW.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT OF THE CITY OF NEW-YORK. By the Hon. Lewis H. Sandford, one of the Justices of the Court. Vol. II. NEW-YORK. Banks, Gould & Co., 144 Nassau street. ALBANY, Gould, Banks & Gould, 475 Broadway. 1851.

These reports are a very valuable addition to the reported judicial decisions of the State of New York. For some reason or other THE SUPERIOR COURT OF THE CITY OF NEW YORK has always maintained a high and well deserved celebrity for the profoundness and accuracy of its adjudications, and with most of the profession in the City of New York has been a favorite tribunal. The profound legal wisdom which has characterized some members of the Court, and the courtesy and urbanity towards the profession in which others have been pre-eminent, have together rendered it so popular as to make it preferred by a large number of the profession to any other where the jurisdiction was co-ordinate. Time has brought changes in the mode of administering justice in this Court, and the hands that dispense it have been changed and multiplied, but with no detriment to its popularity so far as we have been enabled to observe.

It has always been matter of serious regret to us that the valuable adjudications of this distinguished Court are almost wholly lost to the profession for nearly twenty years, for want of a reporter. We are not aware of any other than the present, except the two volumes published by Mr. J. Prescott Hall, in 1831 and 1833, containing decisions from August Term 1828, to December 1829, and the first volume of this series published by Mr. Justice Sandford, in 1849, beginning with cases decided in October Term, 1847. We well recollect the confident and almost scolding manner in which we inquired, some years since, of the Librarian of "The New-York Law Institute," for EVAERT'S N. Y. SUPERIOR COURT REPORTS, and the deep chagrin that overcame us upon being informed that the official Reporter of the Court had not yet announced to the profession or the public when or where these mythical volumes might be procured. The same uncertainty, we believe, still prevails.

We are then heartily rejoiced that one of the ablest of this renowned bench, appreciating the demand for the publication of its adjudications, has taken upon himself, at no inconsiderable addition to his already weighty judicial labors, to give these decisions to the world. As an accurate, careful, and judicious reporter, he has equalled his already brilliant and wide spread judicial reputation. There seems a peculiar propriety now that the jurisdiction of this Court has been made to embrace both law and equity, that these reports should come forth under the fostering hand of one who had already achieved a reputation for distinguished judicial ability, in each.

Upon opening this volume and glancing at the names of the Justices at present composing it, and the name of one no longer of its brotherhood—a pang went to our heart like a burning arrow. It

was the sudden recollection of a forgotten sorrow. The Hon. AARON J. VANDERPOEL—*clarum et venerabile nomen*—is no longer a member of this Court. An elective judiciary and a turn in the wheel of political fortune has displaced as honest and upright a judge as ever sat upon any bench in the world. His was the first judicial face that unbent its stern brows to speak kindly to us when we came tremblingly to the bar, and we shall never forget his urbanity and goodness of heart.

We read the first volume of these reports with pleasure and instruction, and looked eagerly forward for this second volume. We find in this book several very important and able judgments, and feel assured that the profession will be doubly grateful for the satisfactory manner in which they are reported. We find here the first report of a case which to the New-York Bar has already become a bye-word. We refer to *Oakley vs. Aspinwall*—a case that has performed so many remarkable antics that it bids fair to rival the world renowned *Peebles vs. Planestane*. The case of *Keutgen v. Parks* (p. 60) is an important adjudication upon the point of *good faith* in acquiring title to commercial paper. In this case an agent of the plaintiffs was entrusted with a promissory note belonging to them, to procure it discounted. The agent pledged it with a stranger for money loaned to him for his own use at usurious interest. Upon this the learned Reporter, who himself tried this cause (664) remarks :

"On the merits of the case, the defendant claims protection as a purchaser of the note in good faith for value. It is not alleged on the other side, that he had any notice of the fact that R. was an agent and not the owner of the note ; but it is insisted that the defendant received the note as security for an usurious loan, and that having taken it on a contract made in violation of the law, it was not received by him *in good faith*. This is a point of some moment, in the law of commercial paper. It will be observed that there was no *sale* of this note to the defendant. If there had been a sale, there would have been no difficulty. It is undoubtedly true, that the defence of usury is in general personal to the party paying or contracting to pay it. But the principle is not precisely applicable to this case. Here the defendant sets up against the true owner of a note the great doctrine of the law merchant, that the holder of a negotiable bill or note, who has received it in good faith for value, before its maturity, may retain it against the whole world. Now the good faith is a vital element of this doctrine. And can that be said to have been done *in good faith* or in the usual course of trade, which is done contrary to the positive prohibition of a statute, and which statute declares to be void ? We are satisfied that it cannot."

The case of *Smith vs. Oliphant* and wife (p. 306) will be regarded with interest as settling a much mooted point as to how far an infant is liable for money lent. The learned judge carries the doctrine to the full length intimated in *Randall vs. Sweet* (1 Denio, 480) that *an infant is liable for money lent for the purchase of necessities for the infant when so applied under the direction of the lender*.

We cannot refer to the case of *Palmer vs. Wetmore* (p. 316) with the same hearty approbation or satisfaction. In this case it is held

that "A landlord who owns land adjoining the demised premises, has a right to build on such land though he may thereby obstruct and darken the windows in the tenement demised." Inasmuch as this case overturns the settled English law as adjudicated over and over again from the reign of Edward III. to the most recent date; and is also diametrically opposite to the decisions upon the same point in the States of Massachusetts, New Jersey and South Carolina, and wherever else the question has arisen: and as the adverse doctrine to that here laid down had already been indirectly approved in the only two cases where the question has arisen in this State, by two of the ablest judicial minds that have ever adorned its bench; the leading case on this question in Massachusetts (*Story vs. Odin*, 12 Mass. 157) having been cited without dissent by C. J. BRONSON, in *Parker v. Foote* (19 Wendall R. 309) and by Chancellor WALWORTH in *Lasalla v. Holbrook* (4 Paige R. 173): these things being so and this being the pioneer case of a new doctrine in the civilized world, we should have been more gratified if the learned chief Justice had not seen fit to dispose of the matter in about twenty lines without a single reason and without reference to a single authority. But we must close this notice already too long—with the single remark that the points of important commercial law discussed and settled in this volume render it a book worthy of a place in the library of every intelligent merchant in this metropolis.

P. S.

THE AMERICAN CHANCERY DIGEST; being an Analytical Digested Index of all the Reported Decisions in Equity of the United States Courts, and of the Courts of the several States to the Present Time, with Notes and a copious Index; also, an Introductory Essay, comprising an Historical Sketch of the Court of Chancery; an Account of the Nature, Powers and Functions of the Court; and the Organization and Equity Jurisdiction of the Courts of the United States, and of each of the States of the Union. By THOMAS W. WATERMAN, of the New-York Bar. Third Edition, in Three Volumes. NEW-YORK: BAKER, GOULD & Co. ALBANY: GOULD, BANKS & GOULD, 475 Broadway. 1851.

This is a most valuable work, and we confess we do not see how the practical lawyer can dispense with it. It contains a law library in itself. We had intended to enter into an examination of the able way in which it has been prepared, but want of space, we regret to say, prevents our doing so. We cannot, perhaps, do better than let the author speak for himself.

In his preface, the author observes:—

"The value of this Digest is enhanced by the fact of its being a national work—confined to no one State or section, but comprehending each and every State, and the entire country as a whole. Containing all the reported decisions in equity of the United States Courts, and of the courts of the several States of the Union, from the earliest period to the present time; it embodies almost every known principle of American law, and hence becomes a complete encyclopædia of American legal science.

"It was originally placed in the hands of the late John A. Dunlap, Esq., well known to the profession for his learning and accuracy as

a law writer. He had, however, scarcely entered upon the task, when he was prostrated by the disease which, after a languishing sickness of eighteen months, terminated fatally. Shortly before his decease, I was called in to prosecute the work so long unavoidably neglected. Though his sands of life were nearly spent, and the objects of sense fast fading from his sight, the vigor of a highly-disciplined mind continued unimpaired to the last.

The following is a list of the American reports from which the Digest has been compiled:—

Alabama Reports, by Minor, 1 vol.; *Stewart's Reports*, 3 vols.; *Stewart and Porter's Reports*, 5 vols.; *Porter's Reports*, 9 vols.; *Alabama Reports*, (new series,) 17 vols.

Arkansas.—*Arkansas Reports*, 5 vols.; *English's Arkansas Reports*, 4 vols.

Connecticut.—*Kirby's Reports*, 1 vol.; *Root's Reports*, 2 vols.; *Day's Reports*, 5 vols.; *Connecticut Reports*, 19 vols.

Delaware.—*Harrington's Reports*, 4 vols.

Georgia.—*T. U. P. Charlton's Reports*, 1 vol.; *R. M. Charlton's Reports*, 1 vol.; *Dudley's Reports*, 1 vol.; *Kelley's Reports*, 3 vols.; *Georgia Reports*, 8 vols.

Illinois.—*Breese's Reports*, 1 vol.; *Scammon's Reports*, 4 vols.; *Gilman's Reports*, 5 vols.

Indiana.—*Blackford's Reports*, 8 vols.; *Smith's Reports*, 1 vol.

Iowa.—*G. Greene's Reports*, 1 vol.

Kentucky.—*Hughes' Reports*, 1 vol.; *Kentucky Decisions*, 1 vol.; *Hardin's Reports*, 1 vol.; *Bibb's Reports*, 4 vols.; *A. K. Marshall's Reports*, 3 vols.; *Littell's Reports*, 5 vols.; *Littell's Select Cases*, 1 vol.; *Monroe's Reports*, 7 vols.; *J. J. Marshall's Reports*, 7 vols.; *Dana's Reports*, 9 vols.; *Ben Monroe's Law and Equity Reports*, 8 vols.

Louisiana.—*Martin's Reports*, 12 vols.; *Martin's Reports*, (new series,) 8 vols.; *Louisiana Reports*, 19 vols.; *Robinson's Reports*, 12 vols.; *Louisiana Annual Reports*, 3 vols.

Maine.—*Greenleaf's Reports*, 9 vols.; *Fairfield's Reports*, 3 vols.; *Maine Reports*, 16 vols.

Maryland.—*Bland's Chancery Reports*, 3 vols.; *Harris & McHenry's Reports*, 4 vols.; *Harris & Johnson's Reports*, 7 vols.; *Harris & Gill's Reports*, 2 vols.; *Gill & Johnson's Reports*, 12 vols.; *Gill's Reports*, 5 vols.

Massachusetts.—*Massachusetts's Reports*, 17 vols.; *Pickering's Reports*, 24 vols.; *Metcalf's Reports*, 12 vols.; *Cushing's Reports*, 1 vol.

Michigan.—*Harrington's Chancery Reports*, 1 vol.; *Walker's Chancery Reports*, 1 vol.

Missouri.—*Missouri Reports*, 9 vols.

Mississippi.—*Freeman's Chancery Reports*, 1 vol.; *Smedes & Marshall's Chancery Reports*, 1 vol.; *Walker's Reports*, 1 vol.; *Howard's Reports*, 7 vols.; *Smedes & Marshall's Reports*, 13 vols.

New Hampshire.—*New Hampshire Reports*, 13 vols.

New Jersey.—*Greene's Chancery Reports*, 3 vols.; *Saxton's Chancery Reports*, 1 vol.; *Halsted's Chancery Reports*, 1 vol.; *Cox's Reports*, 1 vol.; *Pennington's Reports*, 2 vols.; *Southard's Reports*, 2 vols.; *Halsted's Law Reports*, 7 vols.; *Green's Law Reports*, 3 vols.; *Harrison's Reports*, 4 vols.; *Spencer's Reports*, 1 vol.; *Zabriskie's Reports*, 1 vol.

New York.—*Johnson's Chancery Reports*, 7 vols.; *Hopkin's Chancery Reports*, 1 vol.; *Paige's Chancery Reports*, 11 vols.; *Barbour's Chancery Reports*, 3 vols.; *Edwards' Chancery Reports*, 8 vols.; *Hoffman's Chancery Reports*, 1

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vol. ; Clarke's Chancery Reports, 1 vol. ; Sandford's Chancery Reports, 4 vols. ; Coleman's Cases, 1 vol. ; Coleman & Caine's Cases, 1 vol. ; Caines' Reports, 8 vols. ; Caines' Cases in Error, 2 vols. ; Anthon's N. P. Reports, 1 vol. ; Yates' Select Cases, 1 vol. ; Johnson's Cases, 3 vols. ; Johnson's Reports, 20 vols. ; Cowen's Reports, 9 vols. ; Wendell's Reports, 26 vols. ; Hill's Reports, 7 vols. ; Denio's Reports, 5 vols. ; Barbour's Supreme Court Reports, 5 vols. ; Comstock's Reports, 3 vols. ; Hall's Superior Court Reports, 2 vols. ; Sandford's S. C. Reports, 1 vol.

North Carolina.—Devereux's Equity Reports, 2 vols. ; Devereux & Battle's Equity Reports, 2 vols. ; Iredell's Equity Reports, 5 vols. ; Martin's Reports, 1 vol. ; Haywood's Reports, 2 vols. ; Taylor's Reports, 1 vol. ; Cameron & Norwood's Conference Reports, 1 vol. ; North Carolina Term Reports, 1 vol. ; Carolina Law Repository, 2 vols. ; Murphey's Reports, 3 vols. ; Hawks' Reports, 4 vols. ; Devereux's Law Reports, 4 vols. ; Devereux & Battle's Law Reports, 4 vols. ; Iredell's Law Reports, 10 vols.

Ohio.—Ohio Reports, 18 vols.

Pennsylvania Reports.—Browne's Reports, 2 vols. ; Miles' Reports, 2 vols. ; Ashmead's Reports, 2 vols. ; Dallas' Reports, 4 vols. ; Addison's Reports, 1 vol. ; Yeate's Reports, 4 vols. ; Binney's Reports, 6 vols. ; Sergeant & Rawle's Reports, 17 vols. ; Rawle's Reports, 5 vols. ; Penrose & Watts' Reports, 3 vols. ; Wharton's Reports, 6 vols. ; Watts' Reports, 10 vols. ; Watts & Sergeant's Reports, 9 vols. ; Barr's Reports, 10 vols.

South Carolina.—Desaussure's Equity Reports, 4 vols. ; Harper's Equity Reports, 1 vol. ; McCord's Chancery Reports, 2 vols. ; Bailey's Equity Reports, 1 vol. ; Hill's Chancery Reports, 2 vols. ; Riley's Equity Reports, 1 vol. ; Rice's Equity Reports, 1 vol. ; Cheve's Law and Equity Reports, 1 vol. ; McMullan's Equity Reports, 1 vol. ; Spear's Equity Reports, 1 vol. ; Richardson's Equity Reports, 2 vols. ; Strobhart's Equity Reports, 3 vols. ; Bay's Reports, 2 vols. ; Brevard's Reports, 4 vols. ; South Carolina Reports, 2 vols. ; Nott & McCord's Reports, 2 vols. ; Constitutional Reports, 2 vols. ; Harper's Law Reports, 1 vol. ; McCord's Law Reports, 2 vols. ; Bailey's Law Reports, 2 vols. ; Hill's Law Reports, 3 vols. ; Riley's Law Reports, 1 vol. ; Dudley's Law and Equity Reports, 1 vol. ; Rice's Law Reports, 1 vol. ; McMullan's Law Reports, 2 vols. ; Spear's Law Reports, 2 vols. ; Richardson's Law Reports, 3 vols. ; Strobhart's Law Reports, 3 vols.

Tennessee.—Tennessee Reports, by Overton, 2 vols. ; Cooke's Reports, 1 vol. ; Haywood's Reports, 3 vols. ; Peck's Reports, 1 vol. ; Martin & Yerger's Reports, 10 vols. ; Meig's Reports, 1 vol. ; Humphrey's Reports, 1 vol. ; Yerger's Reports, 10 vols.

United States Courts.—Dallas' Reports, 4 vols. ; Cranch's Reports, 9 vols. ; Wheaton's Reports, 12 vols. ; Peters' Reports, 17 vols. ; Howard's Reports, 8 vols. ; Gallison's Reports, 2 vols. ; Mason's Reports, 5 vols. ; Sumner's Reports, 3 vols. ; Story's Reports, 3 vols. ; Woodbury & Minot's Reports, 2 vols. ; Paine's Reports, 1 vol. ; Washington's C. C. Reports, 4 vols. ; Peters' Reports, (Circuit Court,) 1 vol. ; Baldwin's Reports, 1 vol. ; Gilpin's Reports, 1 vol. ; Wallace's Reports, 1 vol. ; Wallace, Jr., Reports, 1 vol. ; McLean's Reports, 3 vols. ; Brockenbrough, (C. H. Marshall's Decision,) 2 vols.

Vermont.—N. Chipman's Reports, 1 vol. ; Tyler's Reports, 2 vols. ; Brayton's Reports, 1 vol. ; D. Chipman's Reports, 2 vols. ; Aiken's Reports, 2 vols. ; Vermont Reports, 21 vols.

Virginia.—Jefferson's Reports, 1 vol. ; Virginia Cases, 2 vols. ; Wythe's Reports, 1 vol. ; Washington Reports, 2 vols. ; Call's Reports, 6 vols. ; Henning & Munford's Reports, 4 vols. ; Munford's Reports, 6 vols. ; Gilmer's Reports, 1 vol. ; Randolph's Reports, 6 vols. ; Leigh's Reports, 12 vols. ; Robinson's Reports, 2 vols. ; Grattan's Reports, 6 vols.

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[MONTHLY PART.

FUGITIVE SLAVE LAW.

H. S. Circuit Court.

Before the Hon. SAMUEL NELSON, Associate Justice of the Supreme Court of the United States.

THIS Court commenced its session to-day. In charging the Grand Jury, Judge Nelson adverted at considerable length to the Fugitive Slave Law. After alluding to some other matters, which would claim their attention, his Honor proceeded as follows:—

Besides these instructions in respect to the cases on the calendar of the District Attorney, furnished to the court, I desire to call your attention with some particularity, to a recent act of Congress, commonly called the "Fugitive Slave Law," passed Sept. 18, 1850.

This act has been the subject of much comment since its passage, and of various and conflicting opinions, both as concerns the constitutional principle involved, and the matters in detail, embodied in its several provisions. It is a law against which open resistance to its execution has been recommended, in some quarters, as unconstitutional; and in others whether constitutional or not. As all persons concerned directly or indirectly in this resistance, or in any obstruction to its due execution, are guilty of an offence, and subjected to heavy punishment, criminally, and also, by civil damages to the aggrieved party, it is proper that the law should be understood, so that those, if any there be, who have made up their minds to disobey it, may be fully apprised of the consequences.

The act, as you are aware, was passed for the purpose of carrying more effectually into execution a provision of the constitution of the United States—namely, a part of the second section of the fourth article. That provision is as follows:—"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

At the time of the adoption of the constitution by the convention, Sept. 17, 1787, slavery existed, I believe, to an extent, more or less, in each of the States then composing the confederacy; about one-fifteenth of the population of New York were slaves. The proportion of the New England States was much less; also, in Pennsylvania;

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and New Jersey about the same as New York. All the original States, therefore, were interested, more or less, in the adoption of this provision into the constitution, but more especially the Southern States, where, speaking generally, and without strict accuracy, about half the population consisted of this class.

It was, however, anticipated that, in the progress of time, slavery, while it would increase in the South, would diminish and finally become extinguished in the North.

So just was this provision regarded at the time by the members of the convention, and necessary for the security of this species of labor and the existence of friendly relations between the different members of the Union, that it was adopted without opposition, and by a unanimous vote.

It was of the deepest interest to the Southern States, as, without the provision, every non-slaveholding State in the Union would have been at liberty, according to the general law of nations, to have declared free all runaway slaves coming within its limits, and to have given them harbor and protection against the claims of their masters. We need not say, at this day, that such a state of things would have led inevitably to the bitterest animosities, especially between border States, and have been the source of perpetual strife, and of the fiercest passions between the Northern and Southern portions of the Union.

The evil was felt at the time by the Southern portion, as the articles of confederation contained no such provision; and it was to guard against it, and to lay a foundation that would afford future security, and preserve the friendly relations and intercourse of the States, that the provision was incorporated into the fundamental law. No one conversant with the history of the convention, and particularly with the difficulties that surrounded this subject in almost every stage of its proceedings, can doubt for a moment, that without this, or some equivalent provision, the constitution would never have been formed. It was of the last importance to the Southern portion of the Union, and could not have been surrendered without endangering their whole interest in this species of property. It is not surprising, therefore, that it is still adhered to with unyielding resolution, and is made the groundwork of a question upon which the continued existence of a Union, thus formed, is made to depend.

The clause in the constitution is general, and simply declares that, the slave escaping into another State, shall not thereby be discharged by any law or regulation of the State to which he has fled; but shall be delivered up on claim of the person to whom the service is due.

The mode of delivering up to the claimant is not prescribed, and, until regulated by law, continued to be the source of embarrassment to the masters, and of disturbance and disquietude among the States.

This led to the first act of Congress, passed 12th February, 1793, during the sitting of the second session, held under the constitution. It was enacted by a body of men, several of whom had been distinguished members of the convention, and is framed in its leading features in the spirit of the provision of the constitution, which it was

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designed to carry into effect. It is signed by Jonathan Trumbull, of Connecticut, as Speaker of the House of Representatives, John Adams, Vice President, and President of the Senate, and approved by George Washington, President of the United States, and was passed on the urgent recommendations of the Governors of Pennsylvania and Virginia, between whose States a difficulty had arisen in the surrender of fugitives.

The first section on the subject declares, that when any person held to labor in any of the United States, or in either of the territories, under the laws thereof, shall escape into any other State or territory, the person to whom such labor may be due, shall be authorized to seize or arrest such fugitive, and take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city or town corporate, wherein such arrest shall be made, and upon proof to the satisfaction of the judge, or magistrate, either by oral testimony or affidavit, that the person so arrested, owes service to the person claiming him or her, it shall be the duty of the judge, or magistrate, to give a certificate thereof to such claimant, which shall be a sufficient warrant for his or her removal to the State or territory from which he or she fled.

The remaining section inflicts a penalty upon any person who knowingly obstructs or hinders the claimant from arresting the fugitive, or rescues the same from him, or harbors or conceals the fugitive after notice.

This act has been on the statute book, and in operation for more than fifty-seven years; and its constitutionality recognized and affirmed by the courts of Massachusetts, Pennsylvania and New-York, and by the Supreme Court of the United States in *Prigg vs. the Commonwealth of Pennsylvania*, (16 Peters, 439,) and has never been denied by any court with the qualification that will be presently noticed.

The case of *Prigg vs. the Commonwealth of Pennsylvania* in the courts of that State, is no exception to these remarks, as the jury found a special verdict, and the judgment was entered *pro forma* by agreement of counsel, for the purpose of carrying the question before the Supreme Court.

Doubts had been expressed, and, in some instances, decided opinions given by State judges, that it was not competent for Congress to confer upon State magistrates the power to carry into execution a law of Congress, inasmuch as the judicial power of the federal government was vested by the constitution in a Supreme Court, and in such inferior courts as Congress might ordain and establish. It was also argued with much force, that if Congress possessed this power, it might burden the State judiciary and magistrates with duties that would be incompatible with, or embarrass the faithful discharge of those which concerned the State.

Influenced by these views, or some other, the Legislatures of some of the States passed laws forbidding their own magistrates from acting under the law in the surrender of fugitives, and enforced the prohibition with heavy penalties. It is not doubted but that it was

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entirely competent for the State to prohibit their own magistrates from assuming the duty of executing the law; but it was held in *Prigg vs. The Commonwealth of Pennsylvania*, to be clear, that if not so forbidden, it was competent for them to act, and that the exercise of the authority under the law would be valid and binding upon all the parties concerned.

This interference of the State Legislatures, greatly paralyzed the execution of the law; and, indeed, had the effect, for the time being, to abrogate, virtually, the provision of the constitution. It left but one, or at most two officers in a State competent to execute it, as the power was thereby restricted to the District and Circuit Judges of the United States. Our own State, as early as 1830, forbade their magistrates from acting, under the penalty of fine and imprisonment. (2 R. S., 465, § 14.)

These, and other more direct interferences by legislative acts of the States with the execution of the law of 1793, together with the open resistance with which its execution was met, in some instances, by combinations against law, led, necessarily, to the recent supplementary act; and to which I wish now particularly to call your attention.

This act is designed, first, to substitute officers of the federal government in the place of these State magistrates: and second, to arm the officers with sufficient power and authority to enable them to execute the law against any resistance actual or threatened, and in whatever form it might be presented. The act has grown out of the exigencies and necessities to which I have referred, and was forced upon the attention of Congress, mainly, by the legislative interference of the States.

Had not the law of 1793 been thus crippled, it would probably, have afforded all the means necessary to the execution of the constitutional provision.

This supplementary act is obviously framed with great skill and care; and bears upon its face the deep conviction of the body that enacted it, that the constitutional provision had not only been disregarded, but, that a settled purpose, a fixed determination, existed in some portions of the country, to set its obligations at naught. The act meets this condition of things, real or supposed, and clothes the public authorities with powers adequate to the exigency.

It confers authority upon commissioners appointed by the Circuit Courts of the United States, in addition to the judges, to carry into execution its several provisions, and makes it the duty of the marshals and deputy marshals to execute all warrants and precepts issued by the judges or commissioners under the act, subjecting them to a fine of \$1,000 to the use of the claimant in case of refusal; and, after the arrest, and while the fugitive is in their custody, if he or she is allowed to escape with or without their assent, the marshal is made liable upon his official bond to be prosecuted for the benefit of the claimant for the full value of the slave.

The commissioners are also empowered, within the counties in which they respectively reside, to appoint, in writing, one or more suitable persons, from time to time, to execute all warrants and other

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process issued by them in the performance of their duties, with authority to the commissioners, or the persons thus appointed, to summon and call to their aid the by-standers or posse of the county, when necessary to insure the due execution of the law; and it is made the duty of the citizens thus called to the aid of the officers, to assist in the execution of the process whenever their services are required.

The act further provides, that the claimant may pursue and reclaim the fugitive, either by procuring a warrant from the court, judge or commissioner of the proper circuit, district, or county, for his apprehension, or by arresting him, or her, where it may be practicable without warrant, and by taking, or causing the fugitive to be taken forthwith, before the proper officer, whose duty it is made to hear and determine the case in a summary manner; and upon satisfactory proof, either oral or by deposition properly taken and certified, that the person so arrested owes service and labor to the claimant in the State or territory from whence he or she fled, and that they had escaped from such service, to grant a certificate to the claimant, setting forth substantially the facts of the case.

This certificate is made conclusive evidence of the right of the claimant to remove the fugitive back to the State or territory from whence he or she had escaped, and is declared to be sufficient authority to prevent all molestation of the claimant by any process issued by any court, magistrate, or other person whomsoever.

The act subjects to fine and imprisonment, and also to civil damages to the party aggrieved, any and every person who shall knowingly obstruct, hinder or prevent the claimant or his agent from arresting the fugitive, either with or without process, or who shall rescue or attempt to rescue the same from the custody of the claimant or his agent, or who shall aid or assist, directly or indirectly, in the escape of the fugitive, or who shall harbor or conceal the same so as to prevent the discovery and arrest after notice that such person is a fugitive from service.

The act further provides that if the claimant or his agent shall make affidavit, after the certificate is granted, that he has reason to apprehend a rescue by force, before the fugitive can be taken beyond the limits of the State in which the arrest is made, it shall be the duty of the marshal or officer making the arrest, to retain the fugitive in his custody, and to remove the same to the State whence he or she had escaped, and there to deliver them to the claimant or his agent; and to employ as many persons as he may deem necessary to overcome such force; and to retain them in his service so long as in his judgment the circumstances may require.

These, together with some regulations as to the mode of proof before the judge or commissioner, embrace substantially every material provision of the act. And it will excite, I think, some surprise, after the determined opposition to its passage, and even threatened, and, in some instances, actual resistance to its execution in certain quarters, when it is seen, that there is not a power conferred upon those appointed to administer it judicially, but what was conferred upon the judges and other State magistrates under the act of 1793—a law

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approved by Washington and Adams, and enacted by the fathers and founders of the republic—not one. It is simply, in this respect, a substitution of the commissioners in the place of the State magistrates, who were disabled, and prevented from discharging the duty by the State authorities. Full confidence was reposed in them by the federal government, so long as they were permitted to act. When thus disabled, other officers were selected, of necessity to supply their places. This is the only difference, as it regards the judicial authority conferred by the act. Neither is there any power conferred by it on the claimant, his attorney, or agent, but what is found in the act of 1793—not one. All the additional powers are conferred upon the ministerial officers—the marshals and deputy marshals—who are required to execute the warrants and other process issued in pursuance of its provisions, and which warrants and process are the same as those provided for in the previous act, and none others. Every ground of opposition to this recent act, distinguishable from opposition to the former, is exclusively referable to the powers with which the marshal and his deputies are armed, with a view to its execution—powers essential to enforce obedience to the mandates of the officers, and to put down, with a strong hand, if necessary, all disaffection, disorder, insubordination, or resistance, in whatever form presented. The apprehension that any new or extraordinary powers have been vested in the judges or commissioners is entirely groundless; there is not even pretext for any such apprehension. The only apprehension for which there is the slightest foundation, is, that the powers which have been possessed by the judges and State magistrates, since the act of 1793, now by the commissioners in their places, may be effectually executed; that the law is made stronger than the combinations and treasonable influences arrayed against it; and that the provision of the constitution may be enforced and executed in the faith and spirit with which it was adopted.

Another subject arising out of the provisions of this law, and which has a material bearing upon its execution, it is proper should be noticed.

By the second section of the third article of the constitution, it is declared that "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

The power, therefore, it will be seen, to execute this act of Congress belongs to the tribunals and authorities of the federal government; and in respect to these, can be executed only by such courts or officers as are especially designated in the act for the purpose. The power, therefore, is exclusive in these courts or officers, both as it respects the tribunals of the State, or others of the federal government. Neither can act or interfere in the execution of the law; and in case of any attempt of either to interfere or exercise the authority, its acts would be *coram non judice* and void.

These propositions are elementary, and so obvious, as to require no further comment.

It seems to be supposed, however, in some quarters, that the State power, exercised by its tribunals, under the writ of *habeas corpus*,

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forms an exception to this generally admitted doctrine; and that through the agency of this writ the fugitive may be taken out of the hands of the federal officers, and the authority or propriety of the arrest or detainer inquired into, and the person discharged or remanded, according to the judgment of the State magistrate. This is the exception claimed to the exclusive power of the federal officers designated in the act.

It is apparent, if this exception can be maintained, there is an end to the complete execution of the law; or, indeed, of any law of the general government by which the party is subject to an arrest. It is not claimed that the State magistrate can administer the act and enforce its provisions, under this writ, as that authority, as we have seen, is confined to the tribunals appointed by it for the purpose. The fugitive must therefore be taken, if taken at all, out of the hands of the federal officers by force of some other law; and the question whether he or she shall be discharged or remanded, will depend upon the application of that law to the particular case. What that law is, or may be, must necessarily depend upon State regulation; and the rights of the claimant, under the constitution and laws of the Union, will be thus determined by a law of the State.

The effectual abrogation of the act, by the interposition of this writ, if admitted, will be still more apparent, when we reflect that the power exercised under it is such as our State Legislatures may choose to prescribe; and that the State tribunals are not only invested with that power, but if they act at all, are bound to act in obedience to, and in conformity with it. There is no limit, therefore, to the extent of the powers that may be exercised under this proceeding, in respect to the arrest and detainer of the fugitive, but the discretion of the State Legislatures. They may confer jurisdiction upon their magistrates to re-examine and revise the acts and decisions of the federal tribunals, out of whose hands the fugitive is taken, and the State magistrate would be bound to execute the power accordingly.

It is manifest that it would be impossible to uphold the due execution of the law with the admission of any such authority.

Conceding, however, the soundness of this general view, and the inability of the State tribunals to interfere with the federal authorities, when they are acting upon cases arising under the constitution, laws of Congress, or treaties; still, it is argued, that they possess the power, under this writ, to inquire into the legality of the authority, under which the prisoner is held; and which may involve the constitutionality of the law, and jurisdiction of the court or officers.

But it is obvious that the existence of either power, on the part of the State tribunals, would be fatal to the authority of the constitution, laws, or treaties of the general government. No government could maintain the administration, or the execution of its laws, civil or criminal, if their constitutionality, or the jurisdiction of her judicial tribunals, was subject to the determination of another. We need not stop, however, to discuss this question, as it arose and was settled in the case of the *United States v. Peters* (5 Cranch, 115), more familiarly known as *Olmstead's case*. The Legislature of Pennsyl-

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vania had passed an act declaring that the jurisdiction claimed by the District Court of the United States was unconstitutional, and empowered the Governor to resist the execution of its judgment.

Chief Justice Marshal, in delivering the opinion of the court, observed, "that if the Legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under these judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals." He further remarked that, "if the ultimate right to determine the jurisdiction of the courts of the Union is placed by our constitution in the several State Legislatures, then this act concludes the subject; but, if that power necessarily resides in the Supreme judicial tribunal of the nation, then the jurisdiction of the District Court of Pennsylvania over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question."

I need not add that the judgment was regularly enforced, notwithstanding the State act.

There have been different opinions entertained by the judges of the States as to their power, under this writ, to decide upon the validity of a commitment, or detainer, by the authority of the United States. But those who have been inclined to entertain this jurisdiction, admit that it cannot be upheld, where it appears from the return that the proceeding belonged exclusively to the cognizance of the general government.

This necessarily results from the vesting of the judicial power of the Union in the federal courts and officers; and from the fourth article of the constitution, which declares, that "This constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges, in every State, shall be bound thereby, anything in the constitution or laws of the State to the contrary notwithstanding."

If the exclusive power to execute the act is in the federal judiciary, and the act is to be regarded as the supreme law of the land, and to be obeyed as such, it is difficult to see by what right or authority its execution can be interfered with through the agency of this writ by State authorities. Any such interference would seem to be a direct infraction of the constitution.

It is proper to say, in order to guard against misconstruction, I do not claim that the mere fact of commitment, or detainer of a prisoner by an officer of the federal government, bars the issuing or the exercise of the power under this writ. Far from it. Those officers may be guilty of illegal restraints of the liberty of the citizen, the same as others; and the right of the State authorities to inquire into them is not doubted; and it is the duty of the officer to obey the authority, by making a return. All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the constitution, or a law of the United States, or a treaty, the power of the

State authority is at an end. Any further proceeding under the writ is *coram non judice*, and void; and in such a case, that is, when the prisoner is in fact held under process issued from the federal tribunal under the constitution or law of the United States, or treaty, it is the duty of the officer not to give him up, or allow him to pass from his hands in any stage of the proceedings. He should stand upon his process and authority, and if resisted, maintain them with all the powers conferred upon him for that purpose.

We certainly do not anticipate any such exigency. Far from it. The habitual respect of the judiciary, State and national, for the law of the land, and legal authority forbid it. But it is proper that the officers should know their rights, and their duties, if, unfortunately, by possibility, any such exigency should arise.

These views of the paramount authority of the laws of the federal government in no way endanger the liberty of the citizen. The writ of *habeas corpus* secured to him under that government, affords the appropriate and effectual remedy for any illegality in the process, or want of jurisdiction of the court, or for any unconstitutionality of the law. The remedy is as prompt and summary, as when administered by the State judiciary, and in this way, by conceding to each government the free and unobstructed execution of its own laws, and exercise of its own authority, harmony is maintained and perpetuated in the working of our most complex system of government.

The views we have presented will explain a provision in this act of 1850, which is somewhat obscure. I allude to the last clause of the sixth section, which declares that the certificate granted to the claimants to remove the fugitive "shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate or other person whomsoever."

This clause doubtless includes, among other process, the State writ of *habeas corpus*. It could not have intended, or at least, ought not to be construed as intending to embrace that writ when issued by the federal judiciary, as Congress did not possess the power to suspend it. As it respects the State writ we have seen, from the views expressed, that it is but declaratory of the existing law, and not the introduction of any new principle. Without this clause the paramount authority of the certificate would have been the same so far as that process was concerned.

It has been made a question upon this act whether or not it was competent for Congress to confer the power upon the United States Commissioners to carry it into execution. As the judicial power of the Union is vested in the Supreme Court, and such inferior courts as Congress may from time to time establish, the judges of which shall hold their offices during good behavior, it has been supposed that the power to execute the law must be conferred upon these courts, or upon judges possessing this tenure. It is a sufficient answer to this suggestion that the same power was conferred upon the State magistrates under the act of 1793; and which in the case of *Prigg vs. the Commonwealth of Pennsylvania*, was held to be constitutional by the only tribunal competent, under the Constitution, to decide that question. No doubt was entertained by any of the judges

in that case, but that these magistrates had power to act, if not forbidden by the State authorities.

The judicial power mentioned in this section, and vested in the courts, means the power conferred upon courts ordained and established by and under the constitution in the strict and appropriate sense of that term:—courts that comprise one of the three great departments of the government, prescribed by the fundamental law, the same as the other two—the legislative and the executive.

But, besides this mass of judicial power belonging to the established courts of a government, there is no inconsiderable portion of power, in its nature judicial—*quasi* judicial—invested, from time to time, by legislative authority in individuals, separately or collectively, for a particular purpose and limited time.

This distinction, in respect to judicial power, will be found running through the administration of all governments, and has been acted upon in this since its foundation. A familiar case occurs in the institution of commissions for settling land claims, and other claims against the government, (2 St. at large, 324–440).

A strong illustration will be found in this State under the old constitution of 1777. By that justices of the peace were appointed by the counsel of appointment, and held their offices during the pleasure of that body. Yet the powers possessed by these magistrates were conferred by acts of the legislature upon the aldermen of cities who were elected by the people. But I need not pursue the subject, as the question must be regarded as settled by the case referred to.

The same answer may be given, also, to the objection founded upon the seventh amendment to the constitution, which provides that, "in suits of common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The summary mode of hearing and deciding upon the claim to the service of the fugitive prescribed by the recent act, is the same as that prescribed by the act of 1793, which the court, in the case already referred to, held to be clearly constitutional in all its leading provisions.

The proceeding contemplated by the clause of the constitution in question, is not a suit at common law, within the meaning of that amendment. It settles conclusively no right of the claimant to the service of the fugitive, except for the purpose of the removal to the State from which he or she fled—no more than the proceeding, in the case of a fugitive from justice, for the purpose of removal, settles his guilt. The question of right to the service in the one case, and of guilt in the other, is open to a final hearing and trial in the States from whence they have escaped. After the arrival of the fugitive there, the certificate is no longer of any authority, or evidence of any right.

Indeed, so obviously does the constitution contemplate a summary hearing and decision in the matter, that the counsel for the State of Pennsylvania, in the case referred to, did not make it a point or call it seriously in question on an argument.

I have now gone over the several provisions of this law, and some

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of the more material questions arising out of it; and if I am not greatly mistaken, have shown that all the leading features of it—all the principles involved—have been either confirmed by the only tribunal competent to pass upon them, or are so obvious, that no lawyer, I think, can entertain a well grounded doubt upon them, and that Congress has but obeyed an imperative constitutional obligation in its enactment.

It is a law, therefore, which every citizen is bound to obey, and the public authorities to enforce with all the powers conferred upon them by the government.

The legislatures of some of the States have passed laws bearing directly upon this provision of the constitution, and upon its execution in the mode prescribed by Congress. So far as these laws are in conflict with the provisions of the one in question, or tend to obstruct and embarrass its execution, they are unconstitutional, and utterly void; and can afford no protection against its penalties. The law of Congress is paramount, and must be obeyed.

Opinions were expressed in the case of *Prigg vs. the Commonwealth of Pennsylvania*, that the power of Congress to provide the mode of surrendering up the fugitive under the constitution was exclusive; and, that the States were disabled from acting at all on the subject. Others, that the power was concurrent, and, although the States could pass no law, in conflict with the act of Congress, it was competent for them to pass laws in aid of it, and in furtherance of the execution of the constitutional provision.

It is not important here to express any opinion upon these different views; for, whether the one or the other shall finally prevail, the result is the same. In either view, a law in conflict with the act of Congress is void, and of no effect.

It is not to be disguised, that the legislation of most, if not all of the Northern States, tending to embarrass, and, in some instances to annul the provisions of the act of 1793, has strongly impressed our Southern brethren with the conviction that these States have resolved to throw off this constitutional obligation. They take it for granted, and it is difficult to deny the inference, that the acts reflect the general sentiment of the people on the subject; and that it must have become deep and abiding, to be sufficiently powerful to mould the State legislation.

It is this legislation, more than occasional riotous assemblies in resistance of the law, that has forced them to the question, whether the Union, with this provision of the fundamental law rejected and condemned—a provision vital to the rights and interests of that portion, and without which the Union would never have been formed—is to them a blessing or a curse? A question raised, not by disaffected and tumultuous assemblages, often very equivocal evidence of the real sentiment of the public mind, but by the people of the States, through their organized governments, a question examined and discussed in the mode and through the agencies that examined and discussed that of entering into the Union at the adoption of the constitution.

This question has been raised by fifteen States of the confederacy,

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six of whom were original parties to the compact. It has been examined and considered over and over again, by the Governors in their public messages ; by the Representatives in their legislative halls ; by the people in their primary assemblies ; and by the press ; and they have come to the resolution—one and all—that if this hostile legislation is carried into effect, and the constitutional obligation no longer adhered to by their Northern brethren, but thrown off, disregarded, and contemned, the Union is no longer a blessing, and should be dissolved—that the abrogation of one material provision of the fundamental law is destructive of the compact, and the portion of the Union for whose benefit it was adopted, and whose rights and interests are thereby endangered, is absolved from its allegiance.

This I believe to be the settled conviction and sentiment of fifteen States of this Union, and it presents an issue of the gravest aspect, and one that can neither be evaded or suppressed.

It is an issue which the Northern States must determine for themselves. That laws exist on the statute books of most, if not all of them, in conflict with the act of Congress, and repugnant to this provision of the constitution is matter of history. That the enforcement of these laws would be a virtual abrogation of the provision is not to be denied. It remains for these States to determine whether any attempt shall be made to enforce them—whether they are to remain on the statute book a dead letter or be repealed.

These are questions of transcendent import ; for the determination of them, in my humble judgment, involves the perpetuity of the Union.

I am aware that opinions are entertained, and doubtless, honestly entertained, that the Union has not been at any time in danger, and is not now. I wish these opinions were well founded. My deep conviction and belief are, that it depends at this moment, upon the confidence inspired by the late proceedings in Congress, and by the indications of public sentiment in the free States, that this constitutional obligation will be hereafter executed in the faith and spirit with which it was entered into ; that the friends of the Union in the slaveholding States now maintain their ascendancy, and the allegiance of their States by the confidence thus inspired ; and that in case of any action on the part of the Northern States, destructive of that confidence, and of all hope of the execution of the obligation, it would not be in their power to maintain their position ; and, I may add, they would not, if they could.

If any one supposes that this Union can be preserved, after a material provision of the fundamental law upon which it rests is broken and thrown to the wind by one section of it—a provision in which nearly one-half of the States comprising it is deeply and seriously interested—he is laboring under a delusion which the sooner he gets rid of the better. If it is preserved, which I do not doubt, it will be by a stern adherence to this fundamental law, and to every part and parcel of it ; no one section of the Union can throw off the obligation of a part in which it has no interest, or because another is exclusively interested, and expect to preserve it.

The very supposition implies degradation and dishonor, broken faith on the one side, and abject submission on the other.

N. Y. Supreme Court—Myers v. Gemmel.

Neither can the motive for breaking the compact afford any apology or justification.

If one article may be set aside by one portion, because it is repugnant to their sense of right and justice, another may be, because it is against their interest.

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports" by an article of this fundamental law. Suppose New York, deeming this article prejudicial to her interests, by crippling too much her resources and revenue, should levy duties upon the immense trade and exchange now existing between the great west and our eastern brethren; or upon the vast coal trade which our neighboring sister, Pennsylvania, for which we afford so extensive a market, would the motive afford any excuse for the infraction of the constitution? And yet, looking at the compact, and to the constitutional duties and obligations arising out of it, and binding all, this motive is just as available as any other to excuse or justify the infraction.

The example of breaking the compact upon any motive is dangerous. With what face can one State rebuke another for want of allegiance, when she has thrown it off herself? Her rebuke would be "laughed to scorn."

This union must and shall be preserved, if at all, by that stern, old fashioned honesty and principle which inculcates the fulfilment of the whole of our constitutional duties and obligations, and every part of them. It was this spirit that formed the compact, and has thus far preserved it through all its trials and assaults; and it is this spirit that must and will, I trust, carry it safely hereafter through whatever perils and misfortunes it may be destined to encounter.

As men possessing these sturdy and manly virtues have thus far been found in the Republic, equal to every trial and exigency, so I do not doubt they will be hereafter. And they will have their reward—the blessing of all good men of the times in which they live, and of unborn millions, who will be indebted to them, under the favor of heaven, for the rich heritage they enjoy.

N. Y. Supreme Court.

(General Term—February, 1851.)

Before EDMONDS, EDWARDS and MITCHELL, Justices.

MYER S. MYERS vs. JAMES GEMMEL.

LANDLORD AND TENANT—LIGHT AND AIR—STOPPING WINDOWS.

The Common Law of England, on the subject of light and air, as an easement or incident to real estate, is not the law of this country. It was inapplicable to the condition of this country when this State was settled by the colonists; it was not brought hither with them, and formed no part of the law of the colony on the 19th of April, 1775. Where, therefore, an owner of two adjoining lots in the city of New-York, upon one of which was a building deriving its light and air over and through an open space in the rear of the other lot, into which the windows of the building opened and looked, leased the building and lot upon which it was

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erected for a term of years, with its appurtenances, without reserving to himself a right to build on such other lot, or stop, or darken the windows of the building leased, and afterwards built a house, covering the whole open space of the other lot, darkening the windows, and excluding the light and air from the building occupied by his tenants: *Held*, That the landlord might lawfully darken or stop the windows by any erection on the other lot, and such an act was not in derogation of his own grant, and he could not be restrained by injunction from so doing.

THIS was an action under the code, commenced in September, 1850, for an injunction, and in the nature on an action, on the case for a nuisance to the light and air, to which the plaintiff claimed a right of enjoyment, as an incident and easement to the building occupied by him and leased from the defendant, on the north-east corner of Reade Street and Broadway, in the city of New-York. The complaint stated that the plaintiff, relying upon the continuance of the light and air in the manner it had been accustomed to flow and pass over the rear of the lot adjoining and owned by his landlord the defendant, had expended several thousand dollars in improving and repairing the building, and had under-let the same in tenements, so that it yielded him a large profit. That the defendant also owned the lot adjoining in the rear on Reade Street, and was erecting a wall upon his own lot in the rear of this building, demised to the plaintiff, which would exclude a large portion of the customary light and air thereof, and render the premises dark and almost useless, and uncomfortable and unwholesome. An injunction was asked for to prevent the continuance of this erection, and damages for the injury done. An injunction was granted *ex parte*.

ANSWER was put in, but the statement of the case was not materially varied.

The other facts sufficiently appear in the opinion of the court below, —Nov. 11, 1850.

MOTION was made to dissolve the injunction, and was argued before EDMONDS, Ch. Justice.

Livingston Livingston, for Defendant, cited, and relied upon *Mahan v. Brown*, 13 Wendall R., 261; *Parker v. Foote*, 19 Wendall R., 309.

Albert Mathews, for Plaintiff, made and argued the following points:—

I. The restraining by injunction the erection and continuance of private nuisances, is an old established head of equity jurisdiction, constantly exercised and founded upon the ground of restraining irreparable mischief, of suppressing oppressive and interminable litigation, and of preventing multiplicity of suits. 2 Story. Eq. Jur. Sec. 25. Code of Procedure, Sec. 219. *Van Bergen v. Van Bergen*, 2 John Chy. R. 272; *Gardner v. Village of N. Burgh*, 2 Ibid. R. 162; *Belknap v. Belknap*, 2 Ibid. R. 463; *Livingston v. Livingston*, 6 Ibid. 497; *Arthur v. Case*, 1 Paige R. 449; *Hills v. Miller*, 3 Ibid. 256; *Belknap v. Trimble*, 3 Ibid. 577; *Trustees of Watertown v. Cowen*, 4 Ibid. 510; *Mohawk & H. R. R. Co. v. Archer*, 6 Ibid. 83; *Barrow v. Richards*, 8 Ibid. 351; *Gilbert v.*

Mickle, 4 Sandford Chy. R. 357; *Brower v. the Mayor, etc.*, 3 Barbour's S. C. R. 254.

1st. Where a party builds so near the house of another as to darken his windows against the clear right of the latter, either by contract or by ancient possession, courts of equity will interfere by injunction to prevent the nuisance as well as to remedy it if already done, although an action in damages would lie at law—for the latter can in no just sense be deemed an adequate relief in such a case. The injury is material and operates daily to destroy or diminish the comfort and use of the neighboring house, and the remedy by a multiplicity of actions for the continuance of it would furnish no substantial compensation. 2 Story. Eq. Jurisp. Sec. 926. *Lasala v. Holbrook*, 4 Paige 169; *Robertson v. Petinger*, 1 Green Chy. R. 57; *Banks v. American Tract Soc.* 4 Sand. Chy. R. 438.

2d. The only damages recoverable in the action are those which had accrued at the time of bringing suit. *Thayer v. Brooks*, 17 Ohio R. 489; *Miller v. Frazer*, 3 Watts R. 456; *Duncan v. Mirkley*, 1 Harper R. 276; *Vedder v. Vedder*, 1 Denio R. 257; *Blunt v. McCormick*, 3 Denio R. 283.

3d. A total privation of the customary light and air which a party is entitled to have flow and pass into his house is not essential to authorize the Court to interfere to enjoin and suppress the nuisance. It is sufficient if the complaining party, by reason of the obstruction, is unable to enjoy the light and air in so free and ample a manner as before, and to use and enjoy his premises in the manner and for the purposes he has been accustomed. *Parker v. Smith*, 5 Carr & Payne R. 438; *Pringle v. Wenham*, 7 Ibid. 377; *Wells v. Ody*, 7 Ibid. 410; *Cotterell v. Griffiths*, 4 Esp. N. P. C., 69; *Cross v. Lewis*, 2 Barn. & Cress. R. 686.

4th. Although a window or premises be so altered as to admit more light and air than was accustomed to flow and pass into it; this will not justify or excuse an erection that obstructs any of the light or air that was accustomed to flow upon it. *Chandler v. Thompson*, 3 Camp. R. 80.

II. If a man own two adjoining lots, having a house upon each with lights, though not ancient, and lease the one with its appurtenances, he cannot, IN DEROGATION OF HIS OWN GRANT, erect upon the other any building which will obstruct or hinder the light or customary air of the house first leased. [A. D. 1611.] *William Aldred's Case*, 9 Coke's R. 57; [A. D. 1675.] *Palmer v. Fletcher*, 1 Lev. R. 122, 1 Kebs. R. 258 and Lid. R. 167; [A. D. 1685.] *Cox v. Matthews*, 1 Vent R. 237; [A. D. 1703.] *Rosewell v. Pryor*, 6 Mod. 116; [A. D. 1814.] *Compton v. Richards*, 1 Price R. 27; [A. D. 1824.] *Riviere v. Bower*, 1 Ryan & Moody R. 24; [A. D. 1829.] *Coutts v. Gorham*, 1 Moody & Malkin R. 396; [A. D. 1832.] *Swansborough v. Coventry*, 9 Bing. R. 305; [A. D. 1815.] *Story v. Odin*, 12 Mass. R. 157; [A. D. 1833.] *Lasala v. Holbrook*, 4 Paige's R. 173.

1st. He is estopped by his own deed and his own act from claiming a right so to do. *Dezell v. Odell*, 3 Hill's R. 215. 2 Greenleaf Ev. Sec. 471; *Canham v. Fisk*, 2 Crompton & Jervis, R. 126.

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2d. Easements of necessity, appurtenant to lands and tenements are not extinguished by unity of possession and pass to the grantee with or without the words "appurtenances" as an "incident to the principal" conveyed. *Shury v. Piggott*, Bulstrode R. Pt. 3, 339; *Hazard v. Robinson*, 3 Mason R. 276; *Grant v. Chase*, 17 Mass. R. 442.

3d. Such an easement is attached to the estate and not to the person of the lessee and follows it into the hands of the assignee. *Hills v. Miller*, 3 Paige's R. 257.

EDMONDS, Ch. J.—A landlord who owns premises adjoining those he has let to his tenant, has no right to make erections thereon, whereby the enjoyment of the demised premises may be disturbed, as by erecting a high wall on the adjoining lot to deprive his tenant of light or air; and his doing so, if it operate so far to disturb the enjoyment as to dissolve the tenancy, may be restrained by injunction. Motion to dissolve injunction denied.

An *Appeal* was taken to the General Term from this order, and the same was argued by

Charles O'Conner, for Defendant.

Edward Sandford, for Plaintiff.

By the Court.—MITCHELL, J.—On and before 1st Feb., 1849, Mr. Gemmel was seized in fee of the corner house and lot on the east side of Broadway, and north side of Reade street in this city, known as No. 290 Broadway, and also of the houses and lots adjoining to these, known as No. 40 Reade street.

The Broadway lot was 34 feet wide on the front on Broadway, and of the same width in the rear, and 63 feet deep on Reade street, and on the opposite or north side. The house on that lot was five stories high, and was fifty-eight feet in height, and covered the whole lot except an area of 13 by 23 feet—this area or open space beginning on one side at the distance of fifty feet from Broadway, and extending to the Reade street lot, and on the other side beginning 11 feet from Reade street, and extending to the north side of the lot.

The Reade street property consisted of two lots 44 feet front, and 34 feet deep, on which were erected two three story houses, each 22 feet deep from Reade street and 28 feet high at the eaves of the roof, and 35 feet at the peak. Thus the Reade street lots being 12 feet deeper than the houses on them, had yards 12 feet in depth. One De Forrest then owned or occupied the lot to the north of these, but had not built to the rear of his lot, so that Mr. Gemmel's three houses had light from De Forrest's yard, and from Gemmel's area and yards. The Broadway house had and still has the advantage of light from Broadway (one of the broadest streets in that part of the city), and along its whole depth on Reade street; and as if to secure light to the rear, windows were placed in each story on that part which faced the area. There were not, however, windows in the part of the rear wall which adjoined the Reade street lot, although

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that wall rose from 23 to 30 feet above the Reade street houses. There was also a wooden fence eight feet high, entirely separating the Broadway lot from the Reade street lots: and on the area there were privies erected commencing 2 or 3 feet south of De Forrest's lot, and extending about 7 feet along or near the boundary between the Broadway lot and the Reade street lots and rising to the height of 20 feet and communicating with the Broadway house, partly by means of a piazza 3 feet wide over part of the area. There was no communication between the Broadway lots and the Reade street lots.

On the 19th February, 1849, Gemmel leased to Durell for 7 years from 1st May, 1849, "the house and lot known as No. 290 Broadway in the city of New-York, with the appurtenances," at the yearly rent of \$3500 payable quarterly. The lease was under seal, and the landlord entered into no covenants except to keep the roof in repair. In September, 1849, the lease was assigned by Durell to Myers the present plaintiff. Since that, De Forrest has built on the whole rear of his lot, so as to cut off the light that came over his open yard through a space 13 feet wide. In June last, Gemmel tore down his houses on Reade street, and began the erection of other houses which are intended to cover the whole of the Reade street lots, and to be five stories high, and to rise ten feet above the Broadway house.

This action was commenced to prevent his erecting such buildings, and an injunction order was granted to that effect.

A motion was made at Special Term, on the coming in of the answer, to dissolve the injunction; that motion was denied, and the defendant has appealed from the order then made.

The counsel for the defendant, with that fairness and boldness for which he is distinguished, admitted that he could not sustain the appeal if the decisions made in England for the last fifty years, as to the right to light, are to control this case, and the counsel for the plaintiff admitted, with equal fairness, that he did not rely on any covenant, express or implied, on the part of the landlord, and accordingly that the landlord was not liable for any injury resulting from the erection of De Forrest. There was no express covenant applicable to the case, and since the Revised Statutes have declared that no covenant shall be implied in any conveyance of real estate, and that the term "real estate" is co-extensive in meaning with "lands, tenements and hereditaments" (1 R. S., 738, § 140, p. 750, § 10); it is at least probable that no covenant could be implied. The ground assumed by the plaintiff is, that part of the thing actually demised, was the right in the Broadway lot to derive light and air from the Reade street lot; in other words, that by the act of the common owner of the lots, this right had been made part of the Broadway house and lot, and so would pass in any lease or conveyance of that lot.

Only such parts of the common law as, with the act of the Colony in force on the 19th April, 1775, formed part of the law of the Colony on that day, was adopted by us—and only such parts of the Common Law were brought by the Colonists with them as suited their condition. In the application of this restricted rule, a mortgage has been considered with us as being only a security for money, and as leaving the legal title in the mortgagor, as to all persons except the mortgagee,

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while in England the mortgage was considered as passing the whole legal title to the mortgagee. In England, it was "waste" for a tenant to cut down timber; with us, on the contrary, good husbandry required that on a lease of lands, mostly unimproved, the tenant should be permitted to cut down large portions of the timber. So while the population was scattered, and houses were not crowded together, there could not for many years be an occasion for applying the law of ancient lights as now understood in England. It appears by the act of 19 Car. II., ch. 3, passed immediately after the great fire in London of 1666, that there were streets or lanes in that great city not more than fourteen feet in width. (See Keeble's Laws.) In such streets the houses must have derived their only valuable light from their sides or rear, and the necessity of the case may have justified a presumption as a matter of fact from a long undisturbed enjoyment that the lights for the sides or rears of the houses had been granted to those houses by the owners of the adjoining lots. The custom that may have thus arisen, when once established, would be applied also to the houses on the wider streets. Where houses were thus crowded, and so little space left even in the public streets for air and light, it could hardly be supposed that one would leave his land unoccupied and permit his neighbor to receive the benefit of this circumstance, if he were not bound to do so. There was, therefore, no violence to the usages of such places to presume a grant of the right to the ancient lights in such cases. The usage, too, was not uniform; for in London, by custom, a man could build to any height on his ancient foundations. (Vin. Abr. Stopping Lights, C. 1.)

With us there was no room for any such presumption. In the early settlement of the colonies land must have been too abundant for any such question to arise. Light and air came, as the blessings of Heaven, in abundance for all; so that no one could think of claiming a restriction upon his neighbor's lands in order to enjoy them. The abundance and cheapness of land would lead each owner of a house to leave open spaces about his own house, that he might enjoy them as his own, and which he would regulate to suit himself; a garden or an alley might be at the side of his house, and he might, from his side windows, overlook his neighbor, and his neighbor overlook him, and each receive light and air from across the lands of the other; but neither could, in such a condition of the country, claim this as a right. Thus the greater part of two centuries may have passed without any emergency arising, in which the law, as to the right to lights, could arise.

A law inapplicable to the condition of the country for so long a period, could not belong to that part of the Common Law which we brought with us, namely, "so much only as was applicable to our condition," nor as "part of the law of the Colony on 19th April, 1775." And if it could be considered as lying dormant, it could be revived only in such forms and under such circumstances as the habits of the community, and a just regard to the previous general practice and understanding would require. The streets in our cities have been generally broad enough to afford an abundance of light, so far as the front of

the house is concerned; the lots were generally, too, laid out of such depth as to secure ample light from the rear. And when additional lights have been left on the sides, they have not been considered as giving rights over the adjoining owner's land, but each owner, as his own interest has dictated, has occupied the whole of his own ground. It is against the spirit of our people to incumber their lands with privileges in favor of other, though adjoining lands, whether held by them or others; what they own they wish to own absolutely, without being subject to any rights in any other, and to be at liberty to sell or retain each part free from control from the other. They are proverbially distinguished for looking to the future, and as they expect future greatness to their country from the course of years, so they are confident that the future will add to the value of their lands and create the expediency and necessity of improving them by more extensive buildings. Yet, while they were not injured by their neighbor's deriving any benefit from their unoccupied lands, it would be equally against their sense of right to interfere with their neighbor's enjoyment. With this feeling pervading the people, it is not surprising that (as we believe the fact to be,) lawyers in extensive practice in real estate, have not known any instances of express grants of rights to light and air until within a very few years, and then in but few cases. In such a community it would be doing violence to the habits and customs of the people to presume a grant or intention to grant a right to another over adjoining property not within the limits shown on the face of the grant, or not unquestionably indicated by the use and situation of the property; and if it were left to a jury they could not properly find that there was such a grant.

If (as in *Jones' Court*, and *Jauncey Court* in Wall street, in this city,) buildings are erected occupying the four sides of the lot, with an open space in the middle for light and air, which is free to the occupants of all the rooms in the adjoining buildings, with a common entrance for all, and separate apartments are then let out to different tenants, the owner may well be considered to have dedicated that open space for the benefit of all the tenants; the intention to do so would be undoubted—it would be only necessary to show the place or a plan of it, to obtain the admission of all, that such was the intention. So, also, by the devise of a mill; the right to use the water that moved it may well pass as part of that which was meant by the words used: and if a stream runs through land sold, and also through adjoining land, the right to have it continue to flow, and that it should not be diverted, would pass as part of what was clearly intended to be granted. On this principle, the case of *Story v. Odin* (12 Mass., 157), may well have been approved wherever it was referred to; although, in some instances, it has been quoted to sustain the present English doctrine. There the plaintiff's house was bought by him in 1795, from the town of Boston; it then, with other three buildings, formed part of three sides of a square, and had (as well as the other houses) a door in *each story* opening into a vacant lot of ground in the middle of this square; this vacant lot was used by the several tenants as a deposit for casks, boxes, etc., and sometimes for a passage way. The yard continued to be so used until 1812, when

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it was sold by the town to the defendant. The vacant lot was thus actually connected with the adjoining buildings, by means of the door in each story opening into it, and also by the use to which it was devoted, and this would be the conclusion on a mere view of the lot,—the view alone would be enough also to indicate that both were owned by the same parties. If that use of the yard had been confined to the building of the plaintiff only, there would have been little doubt that the vacant lot formed part of the house and lot bought by the plaintiff; as a yard used with any other house may form part of the lot on which the house is built. But the facts here are entirely different. No one would imagine in this case, by only seeing the property, that any rights were attached to the Broadway house over the Reade street lot, any more than that they extended over De Forrest's lot also. It would be seen that while De Forrest's lot was left open the light would be probably sufficient; but no inference would be drawn that the landlord meant to grant a right over De Forrest's lot as part of the thing demised, nor would the inference be any more justifiable that he meant to grant a right over the Reade street lots. If the lessee knew that Gemmel owned the Reade street lots (which is not alleged here), and he expected to derive light during his term from the Reade street lots, it would have been only fair for him to have said so to his landlord, and to have expressly agreed with him for that privilege.

The form of the Broadway building also showed to the tenant that the landlord had constructed it so as to secure to it a *definite* quantity of light and air within its proper bounds, and that it was not to depend on deriving either from other sources.

The extreme rear adjoining the Reade street property, though between 23 and 30 feet above the Reade street houses, and 12 feet in depth, had not a single window in it. Thus indicating that the expectation was that the Reade street property would be raised so high as to cover any lights that might be put there. In the same way lights were placed in every story on the south and west sides of the area, that they might get the light from it. If it had been intended to subject the Reade street lots to this incumbrance, Gemmel would undoubtedly have left no open area opposite the yard of the Reade street lots, but would have built his Broadway house close up to that yard. So, too, not only was there a fence to separate one lot from the other, but there were privies on the Broadway lot rising to the height of 20 feet, and covering all but 5 feet of the space opposite the yard of the Reade street lot—this 20 feet of height precluded the idea that light was intended to be derived to the Broadway lot from the lot on Reade street; it would almost as effectually darken the cellars and first story and part of the second story as the present unfinished building.

The Counsel for the plaintiff did not state whether in his view Mr. Gemmel would have retained this privilege as belonging to his Broadway lot if he had retained that lot and sold the Reade street lots to another person; yet if from the construction of the building that privilege had become part of the Broadway lot so as to pass by a simple grant or lease of that lot, that result would seem to follow;

and it is probable that such is the English law in such cases; and that the right does not depend on which is first sold by the common owner of the two lots. Such is the opinion of Gale and Wholley in their valuable "Treatise on Easements." They say: "the obligation is imposed equally on the grantee and the grantor" (p. 50). They add, (p. 51) that "the only opposition to the *current* of authority that this disposition is binding equally on the grantor and *grantee* and the parties claiming under them respectively is a dictum of Lord Holt in the case of *Tenant v. Goodwin* as reported by L. Raymond," and the cases quoted, and the principles stated by them seem to sustain their view (see *ib.*, p. 51 to 77). Such was the opinion of Twisden, J., in *Palmer v. Fletcher* (1 Lev. 122), and the decision in *Riviere v. Bower*, (1 Ryan and Moody 24), where the landlord recovered against his tenant for obstructing lights of a house adjoining the demised premises; such also is the rule in the analagous cases of ways of necessity, where if the grantor sells lands surrounding a close which he retains, he retains a right of way over the lands sold (see Gale and W. as above, and page 77, &c.) The same rule has also been applied to light where the sales of both lots were at the *same time* as in *Swansborough v. Coventry* (9 Bing. R. 305).

A rule thus blindly fettering estates without any written evidence of right, and equally annoying to buyer and seller should not be adopted here unless it was clearly the law of our own state. Justice Bronson showed in the case of *Parker v. Foote* in 19 Wend., 309, that the English law as to lights does not apply to this country; and we would have simply referred to that decision, but that it was truly said that that case *was also* decided on another point; still the Chief Justice expressly concurred with him on that point, and it is believed that that part of the opinion was received at the time with cordial approbation by the public and the bar. Vice Chr. Sandford in *Banks v. American Tract Society*, (4 Sandford's Ch. R., 465,) admits that such "is probably to be deemed the decision of the court," but declined expressing an opinion whether it was an open question or not, and said still less did he mean to intimate a bias either way.

He has since published the 2d vol. of the Superior Court Reports, of which court he is a distinguished member, and without expressing any dissent, gives the decision of that court in the case of *Palmer v. Wetmore*, and states the point decided to be that a landlord who owns land adjoining the demised premises has a right to build on such land, though he may thereby obstruct and darken the windows in the tenement demised (p. 316).

Authority as well as principle show that to be the law of this state. The order appealed from should be reversed with costs, and the injunction be dissolved.

Edwards, J., concurred. Edmonds, Ch. J., dissented.

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LITCHFIELD *agst.* BURWELL AND OTHERS.

(*Erie Special Term—Dec., 1850.*)

The appointment of a referee must be made by the court (§ 270 and 273) although parties may agree upon a suitable person for a referee. The court must be satisfied that the selection made by the parties is a proper one.

A referee who proceeds in a cause, by virtue of an appointment by stipulation of the respective parties, merely, acts without authority.

The facts upon which a plaintiff relies for judgment against infant defendants, must be established by legal proof, notwithstanding, the attorney for the guardian of the infant defendants may have consented in writing that such judgment be taken, upon the report of a referee.

The guardian's responsibility to the infants does not help the difficulty.

Consent to use as testimony what the law will not recognize as such, cannot avail, although it be incorporated in a report of a referee.

Where the court clearly discover that the interests of infants are committed to a guardian who is not likely to protect them, he should be removed, and a proper one appointed.

The service of a summons, to be used as evidence against defendants who have not appeared, is defective where the sheriff's certificate is produced which states "that he served on them a copy of a summons and complaint," without mentioning any cause in which it was served.

Such service is likewise defective, where an admission of service purporting to be signed by some of the party's defendants is produced without some evidence of their signatures being genuine, or were written to the admission with their assent. The court takes judicial notice of the signatures of its officers, but are not presumed to know the signature of a party defendant, who has not appeared.

The admission of service of summons by party's defendants residing out of the state, is ineffectual as the basis of any judicial proceeding in *personam* in this state.

The complaint in this cause is in the nature of a bill in equity, to correct an alleged mistake in a deed of conveyance executed by Joseph Clary in the year 1830. Erie county is specified as the place of trial.

The plaintiff claims through various mesne conveyances, under Clary's grantee. It appears from the complaint, that the land in question lies in the city of Buffalo, and it is alleged that only a small part of the land described in the deed was owned by Clary, but that he owned an adjoining lot which is the one intended to have been conveyed. The object of the suit is to obtain a conveyance of these premises.

Joseph Clary has been dead for a number of years and the defendants are made parties as his devisees. Four of the defendants are infants, and appear by a guardian, duly appointed on the application of the plaintiff, and one adult defendant appears by an attorney. An affidavit is presented here showing that no other defendants have appeared; that none of the adult defendants have answered, and that a general answer has been put in for the infants.

The attorney for the guardian *ad litem*, and the plaintiff stipulated that the cause should be referred to a person residing in the city of New York and that the hearing should be had there. The plaintiff moves upon a report of this person, who acted as referee, and the evidence before him, the affidavit above mentioned, notice to the parties who have appeared, and what is claimed to be due evidence of service of the summons on those who have not appeared, for a judgment pursuant to the prayer of his complaint. He also produces the written consent of the attorney for the guardian of the infant defendants, that he may take such judgment.

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The attorneys for the plaintiff reside in New York ; the attorney for the guardian resides in Albany.

John Ganson, for the Plaintiff.

SILL, J.—There are fatal objections to granting a judgment in this case. It may be proper to remark that the moving counsel is not responsible for the irregularities appearing here, as he is not the attorney in the case. By the Code parties may consent to a reference and may agree upon a suitable person for a referee; still it directs the appointment to be made by the court (§ 270–273). The person selected must be suitable for the purpose (§ 273); and if the court is satisfied that the selection is not a proper one, the order appointing him (at least in the case of infant defendants) may undoubtedly be denied, notwithstanding the stipulation.

The person assuming to act as referee in this case proceeded without authority, and his report has no more legal force than a communication from any other gentleman, who might address the court, on the subject of this suit.

Passing by this objection, the testimony taken by the referee (as he is called) was incompetent, and if admissible would have been wholly insufficient to justify the conclusion at which he arrived.

It appears that two witnesses only were examined. The testimony of one went merely to show that the plaintiff had been in possession by his tenant of the premises claimed, at some specified period in 1837 or 1838, and subsequently. This testimony seems to have been taken before the referee on the 23d September, 1850. The other witness resides in Buffalo; is a general land agent, as he says, and has been for several years the agent of the plaintiff. He was examined upon written interrogatories addressed to him at Buffalo, and answered without the intervention of a commissioner or referee.

The guardian for the infants does not propose cross interrogatories or to cross examine the witness; nor does it appear that he had any notice of the proceedings. The witness drew up his own answers to the interrogatories and verified them informally (and I am inclined to think extra judicially) before a commissioner of deeds, on the 11th of October, 1850. After this, and on the 15th of October, the attorney for the guardian stipulates at Albany that these answers may be read before the referee and that the referee may proceed in the cause without further notice to him.

The witness states that he came to Buffalo in 1834, four years after the deed in question was executed. He says that Clary did not own the land, described in the conveyance in 1830, but that he owned an adjoining lot.

That the land described in the deed belonged to one Brown. He undertakes to show also by parol, from whom Brown and Clary derived title to their respective lots, but he does not trace the title even by parol to any legitimate source, or show that any of the persons he names as grantors were ever in possession, or ever saw either lot. One of the interrogatories put to the witness assumes that there was a mistake in the deed, and asks the witness when he discovered it. He answers, in 1843.

N. Y. Supreme Court.—*Litchfield v. Burwell and others.*

This is the substance of this person's information, for it is not testimony, and incompetent and insufficient as it is, the referee reports that a mistake in the description of the land is proved. The witness not only fails to show that he has any personal knowledge of a mistake, but shows affirmatively that he could not have any such knowledge.

In answer to the last general interrogatory the witness volunteers to refer to a letter which he had previously written to one of the plaintiff's attorneys, and says that the letter is true according to his best knowledge and belief. This paper purports to contain some disjointed and imperfect extracts from the will of Joseph Clary. Upon this verification this letter is admitted as evidence, and is deemed sufficient to prove the execution and contents of the will, and to establish the character of the interest of these infant defendants in this land. It is impossible that such a proceeding can be upheld. Both the attorney for the guardian and the referee grossly mistook their powers and their duties. The facts which will entitle the plaintiff to a judgment must be established against these infants by legal proof. Neither the guardian *ad litem*, or any other person has power to waive this proof nor any right without it to consent to a judgment. This is a rule of law that cannot be evaded, by consenting to use as testimony what the law will not recognize as such, and the consent of the attorney for the guardian that what is here called testimony, but which does not rise to the dignity of a well authenticated rumor, should be received, does not justify the referee in acting upon it as evidence.

It may be thought that the guardian's responsibility to the infants, is an answer to these objections. This is no reason why judgment should be given against them without proof. As well might it pass without any investigation at all, upon a tender of indemnity for the injury it might work to their rights. The guardian erred in committing the interest of these infants exclusively to an attorney, who seems to have acted under the idea that a guardian was appointed for the convenience and facility of the plaintiffs and not for the protection of the defendants.

The 56th rule of the court forbids the appointment of a guardian *ad litem*, for infant defendants, who is not their general guardian; or an attorney or officer of the court, who is fully competent to understand and protect their rights.

The rule undoubtedly contemplates that where an attorney is appointed guardian, he shall give his personal attention to the interests committed to his charge.

It is not practicable in this case to distinguish between the acts of the guardian and those of the attorney to whom he seems wholly to have committed the trust reposed in him. If these infants have any rights in this case their interests are now committed to hands where they are not likely to be protected, and I do not see how I can consistently avoid the unpleasant duty of removing this guardian and appointing another in his place.

An order of reference might perhaps be now made but for the fact that the evidence of the service of the summons on some of the parties who have not appeared is defective.

For the purpose of showing service on the defendants Judd and wife, a sheriff's certificate is produced, which states that he served on them a copy of a *summons and complaint*, but it does not appear that they were the summons and complaint in this cause.

The service upon the defendants Norman Rice and wife, is sought to be proved by an admission to which their names are written, but there is nothing showing that the signatures are those of the defendants, or were placed there by their direction. The court takes judicial notice of the signatures of its officers because they are such; but I am not apprised of any theory or legal fiction by which the court are presumed to know the signature of a party defendant who has not appeared in the cause (2 *Hill*, 369).

The Code makes the defendant's admission evidence of service, but I cannot know that it is the admission of these defendants without some evidence showing the signatures to be theirs, or that their names were subscribed to it with their assent.

There would be another difficulty in this case even if I could take judicial notice of the genuineness of these signatures. The admission is not dated at any place, nor does it state where the service or admission was made. But in looking into the letter of the Buffalo witness, which the plaintiff has made evidence against himself, I find it there stated that Norman Rice and wife reside in the state of Michigan. In the absence of any proof to the contrary it must be assumed, and probably such is the fact, that the service and admission were made in that state. Service of process out of the territorial jurisdiction of the court from which it issued was at common law a nullity, and service of the process of our courts on defendants out of this state is inefficacious as the basis of any judicial proceeding in personam (*Hulburt v. Hope Mutual Ins. Co.*, 4 How. Pr. R. 275; same case same vol., 415).

Proceedings may be had against property in this state belonging to a non resident. But notice must be given to such non resident in the mode which the Code specifies (§ 135), and which it calls service of a summons in the suit. In all such cases an order for publication made by the court or a judge is indispensable and then the effect of a personal service is merely to dispense with the service by mail, prescribed by the Code of procedure (§ 135, sub. 6). Without an order and publication personal service is unavailable.

The motion for a judgment is denied. The application for an order of reference upon the stipulation of the plaintiff's attorney and the guardian ad litem, is denied, upon the ground that the cause is not shown to be in readiness for a reference and upon the ground that it appears that the person named in that stipulation is not a suitable person for referee in this case.

But the plaintiff is at liberty upon producing the proper evidence of service on the parties, who have not appeared, and notice to those who have, to move for a reference to a suitable person, or to make such other motion in the premises as he shall be advised.

The order must also direct that the guardian ad litem of the infant defendants be removed, unless cause is shown against it at a future term, and that Dennis Bowen, counsellor of this court, residing in

N. Y. Supreme Court—Williams v. Wilkinson.

the city of Buffalo, be appointed in his place, and all orders and papers in the case are hereafter to be served on Mr. Bowen as such guardian.

WILLIAMS *agst.* WILKINSON.

(*Yates Circuit and Special Term—October, 1850.*)

Although § 172 of the Code allows an amendment of a pleading once, of course, and without costs, yet as to costs, it can apply only where the first pleading has been regular. If the opposite party has prepared and served motion papers to set aside the first pleading for irregularity, which is cured by the amendment, the party amending must pay such costs, even if his amendment is in time under that section.

Motion on behalf of defendant to set aside complaint.

The affidavits on the part of the defendant show that the complaints, which were served on the 20th day of September, 1850, did not contain the name of the county in which the plaintiff desired the trials to be had, according to section 142 of the Code.

On the part of the plaintiff it is shown that the name of the county was omitted by mistake. That immediately after service of the notice of this motion and before the expiration of twenty days after service of the complaint, an amended complaint was served, in which the county of Yates was inserted as the place of trial.

It is admitted by the counsel on both sides, that when the amended complaint was served, the defendant's attorney objected to receiving it, unless the costs of the motion were paid; and that no costs were paid or offered.

E. Van Buren, for defendant.

W. S. Briggs, for plaintiff.

WELLES, J.—The defendant was regular in preparing for and serving notice of this motion. The plaintiff's counsel contends that he also is regular in amending and that § 172 of the Code entitles him to the amendment of course, and without costs. That section, I apprehend, applies only to a case where the party wishing to amend his pleading, has been regular, or where he amends before his adversary has taken any steps founded upon an irregularity. It would allow the statute to become an instrument of oppression if the plaintiffs in this case are to avoid the payment of the costs of the motion by curing the defect complained of by means of an amended complaint, served after the defendant had prepared for and given notice of the motion.

The motion must be granted with ten dollars costs, unless the plaintiff within twenty days pays the defendant's attorney ten dollars costs, and stipulates to allow the defendant twenty days thereafter to answer the amended complaint.

N. Y. Supreme Court—Gould and others v. Chapin and others.

GOULD AND OTHERS *agst.* CHAPIN AND OTHERS.

(Monroe General Term—June, 1850.)

Before WELLES, P. J., and SELDEN and JOHNSON, Justices.

On appeal from a judgment upon a report of a referee, the *date of issue* on the general term calendar, must be the day of *filing the report*.

This is an appeal from a judgment on the report of a referee, the decision of the referee to stand as the judgment of the court.

The appellant put the cause upon the calendar, and in the note of issue, stated the time the last pleading was served, according to which the clerk gave it precedence on the calendar.

S. B. Jewett, for the respondent, moved to correct the calendar by putting the cause down so as to take date only from the filing the report and entering the judgment.

M. T. Reynolds, for the appellant.

By the Court, WELLES, J.—Neither the Code or the present rules have provided in what order causes shall be placed on the general term calendar. The former practice must therefore govern (§ 469 of the Code and rule 92 of this court). Law rule 51 of the rules of this court adopted in July 1847, provided that the note of issue to be filed with the clerk should contain, among other things, "the date when the question arose," and rule 53 of the same rules required the clerk to make up the calendar according to such dates. Such had long been the practice before (Gr. Pr., 2d ed., 671-2), and there is nothing inconsistent with it in the Code or the present rules of this court.

In case of a motion to set aside an inquisition or report, the question was deemed to have arisen on the day when the writ of inquiry with the return, or when the inquisition or report was filed (*Id.*, 672). In analogy to that practice we think the question in this case must be deemed to have arisen on the day when the report of the referee was filed.

Let the calendar be corrected accordingly.

We have received the 4th volume of Edward's Chancery Reports, bringing the decisions of Vice-Chancellor McCoun down to the time of his retirement from the Bench. We propose noticing it in our July number.

Common Pleas.—Van Dyke v. Jackson.

Court of Common Pleas.

[*City and County of New-York.*]

Before the Hon. L. B. WOODRUFF.

[*Special Term.*]

MICHAEL VAN DYKE *agst.* PARMENUS JACKSON, *et. al.*

GOODWILL OF PARTNERSHIP BUSINESS.

There can be no such thing as the goodwill of a business to be taken in the settlement of partnership accounts, and to be made a charge by one partner against another, unless connected with an actual interest in the place where the business has been carried on.

This was a motion to set aside a report of referees on the merits, and for a new trial. The facts in the case were, that the plaintiff and defendants were partners in carrying on a refectory business at Nos. 17 and 19 Catharine street, in the city of New York, under an agreement, by the terms of which the defendants were to give stock and fixtures, the goodwill of the leases of the premises, pay for the hire of one man, and keep the premises in repair. The plaintiff, in lieu of capital, was to pay the defendants \$63 per year, occupy a part of the premises with his family, who were to give their whole time and attention to the business, to bear half the expenses of the establishment, and the net profits were to be divided monthly between them. That on the first of April, 1848, the partnership ceased, and the partners separated, both continuing the same business, the defendants at the old place, and the plaintiff at Nos. 23 and 25 Catharine street. On the trial the principal claim made by the plaintiff was for the goodwill of the business, which it was contended had become very valuable, principally through the exertions of the plaintiff, and which goodwill was estimated by the various witnesses at about \$1000. The leases of the premises were about expiring at the time of the dissolution and no value was attached to, or claimed by the plaintiff therefor. To the introduction of testimony, showing the value of the goodwill of said business at the time of the dissolution, the defendants' counsel objected, on the ground that it was not shown that any goodwill existed after the dissolution, (no value being attached to or claimed for the unexpired term of the lease,) which could legally form the subject of a charge on the part of the plaintiff against the defendants, or create any obligation on the part of the defendants to pay anything to the plaintiff therefor, that there was no such thing as the "goodwill of a business," to be taken in settlement of partnership accounts, and to be made a subject of charge by one partner against the other. The defendants' objection was overruled by the referees, and the testimony admitted, and a verdict rendered in favor of the plaintiff for \$628 38.

The case came on to be heard at Special Term, before his honor, Judge Woodruff, in a case made.

Garrit H. Striker, for the defendants, made and argued the following points:

I. The referees erred in charging the defendants with the one half of the value of the furniture on the premises at the time of the dissolution.

1. There is no *proof* that any furniture belonging to the firm, or acquired by the money of the firm, remained to the use of the defendants after the dissolution; the *purchase* of furniture during the *existence* of the firm will not warrant any such inference.

2. The partners fully settled in relation to all the *joint property* on 1st April, 1848, by making an inventory on that day, the amount of which was paid to the plaintiff, by the sale to him of the Bowery Saloon.

3. If there be any *inference* to be drawn from the slight proof adduced, that any furniture acquired by the *joint concern* remained in the defendants' firm after the dissolution; the settlement shows that such furniture was to be taken by the defendants as an *equivalent* for the furniture *originally* contributed by them, and used up or deteriorated in the business.

4. If such furniture remained and was not settled for by the defendants, there is no principle of law which warranted the referees in charging the defendants with one half of its assumed value. It continued to be the property of the firm, and a sale should be ordered.

II. The referees erred in charging the defendants with any sum as the value of the "*goodwill*" of the business, carried on at Nos. 17 and 19 Catherine street, at the time of the dissolution of the firm. Collyer on Part., § 163, 161, 162, 322. Story on Part., § 99. Jacob, 607—623; *Cook v. Collingridge*, 17 Ves., 336; *Crutwell v. Lye*, 1 Hoff, Ch. R., 68; *Doughty v. Van Nostrand*, 4 Paige R., 479; *Martin v. Van Schaick*, 7 Simons R., 421; *Lewis v. Langdon*, 3 Kent Con., 64. 17 Ves., 298; *Featherstonhaugh v. Fennich*, Ib., 336, *Crutwell v. Lye*.

1. Where a partnership is *dissolved*, and each partner continues the same business on his own account, there is no such thing as the "*goodwill*" of business, to be taken in settlement of partnership account, and to be made a subject of charge by either partner as against the other.

2. The only foundation for any pretext of there being any "*goodwill*," was in the old lease, and that was found against the plaintiff. By the terms of the agreement the plaintiff was to pay \$63 for the annual use of this "*goodwill*." The "*goodwill*" was therefore *capital of the defendants*, and they had a right, when the partnership ceased, to withdraw it, it belonged to the defendants, and not to the plaintiff. Besides, the plaintiff immediately started the same business a few doors from the old place, and in a place which was more eligibly situated, and better adapted to the business, and he carried with him all his share of anything in the nature of goodwill.

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3. I defy my friend to point in the law of partnership to a single case where "goodwill" is held to be a subject of charge by either partner as against the other, in settlement of the partnership accounts. Where the partnership is wound up by the *Court through* a receiver, he may sell out the stock in trade, with the *rights* of the firm to the occupancy of the place, where the business is carried on, and he may possibly in such a case get something for the privilege of taking the stock, and carrying on the business at that place. *But what could he get for it*, if, upon his appointment, each of the partners had set up on his own account, the same business on each side of the former place of business of the firm?

Suppose one partner retires voluntarily, and refuses to do business longer, upon what *principle* is he to demand *any compensation* from his former associates for their continuance of the business? They have the right to continue business if they please, and are liable to no fine for that privilege.

Much less then can either make a claim against the other, where *each continues* the same business, in the *same vicinity*. The claim is as unfounded in the nature of things, as it is unsupported by law.

J. M. Van Cott, contra.

WOODRUFF, J.—The exceptions taken by the defendant on the hearing, were to the admission of evidence tending to prove the value of the alleged *goodwill* of the business carried on by the parties under the agreement of co-partnership; and the defendant now further objects to the allowance by the referees to the plaintiff of the sum of \$475 and interest thereon, for such goodwill. The defendant's exceptions to the admission of evidence and his objections to the finding in this particular, present only a single question.

The parties agreed that the plaintiff should become a co-partner in the victualling saloon then carried on by the defendant; should put in no capital, but should pay the defendant's interest on one half the capital already invested, i. e. the value of the stock, fixtures and goodwill of the leases; which premises they were to keep in repair at their own expense, and at the end of the year the plaintiff was peaceably to give up possession of the premises. That business appears to have been continued after the end of the year, but I find no evidence of any change of terms. I perceive no foundation whatever for any claim for the value of any goodwill, if there be any such thing as goodwill of the business disconnected with an actual interest in the *place* where it is carried on. The plaintiff agreed to carry on business with defendants for one year, and then to leave it in their hands. His attention and services may have improved the business; if they did so, that may have been the very motive which induced the defendants to enter into the original agreement; at all events they were in the possession of the business before he went there; they admitted him to a participation in its profits on condition, among other things, that he would peaceably leave the possession to them at the end of the year, so that without stopping to enquire whether there is any such thing as the goodwill of a business

separate or detached from the place itself in which it is carried on, it is sufficient to say :

1st. If it was attached to the *place*, he was by the agreement bound to leave it, and the defendants were not bound to pay him for doing so.

2d. If it was not thus *attached* to the *place* of business, if it could be detached and used separate therefrom (which to me at least is a novel suggestion), the defendants have no more taken possession of it than plaintiff. Both are carrying on the same business, and the defendants might as well ask plaintiff to pay them for it, as joint property used by *him*, as he make the present claim upon them.

The referees, therefore, erred in admitting any evidence of such value, and in making any allowance of such goodwill.

The other question raised by the defendants is, whether the referees properly allowed the plaintiff for the furniture purchased during the continuance of the partnership, and whether they have made the allowance upon proper proof.

It would seem that the referees fixed the amount of the allowance by taking a list of all the articles purchased during the partnership, and deducting from the cost 50 per cent., or one half, and allowed to the plaintiff, of the value thus ascertained.

It is not by any means clear that in this they have not committed an error in the defendants' favor. By the terms of the agreement, the defendants are recited to be the owners of "stock and fixtures and goodwill of the houses, 17 and 19 Catherine street, and agree to keep the *said premises* in repair at their own expense ; at the end of the year the plaintiff was to leave them in possession.

From the whole agreement the inference is very strong that the defendants were to be at the expense of keeping up the establishment, by making all needed repairs to the property which should be left by the plaintiff.

It could not, I think, have been the intention that the plaintiff should be at any expense of this kind, and give the defendants the benefit of the expenditure. In this view the referees should have charged the whole expense to the defendants. There are, however, on the other hand, reasons for doubting whether the parties really intended that the wear and tear and breakage should be at the defendants' expense, and for insisting that the circumstances present a case in which the parties, in their original agreement, omitted to provide for this particular subject. But if the defendants were not bound to pay for the whole of the furniture, and either under a just interpretation of the original agreement, or under any supposed modification (of which the defendants claim the books to be evidence, inasmuch as they show that the furniture was paid for out of the joint receipts), plaintiff was bound to pay and bear his half of the costs ; then the furniture thus purchased remained at the expiration of the partnership the joint property, and if taken by the defendants, and appropriated to their own use, they became liable in accounting with the plaintiff to pay him one half its value.

The referees were, I think, upon the pleadings and the evidence, warranted in finding that the defendants had retained and appro-

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priated the furniture, &c., to their own use, and although plaintiff might have been at liberty to pray for an actual sale and division of the proceeds, still I think upon the admissions of the answer, that the defendants had *retained* the furniture (though qualified by a denial of the alleged amount and value), and their declaration of readiness to have the account stated in a manner agreeable to justice, the plaintiff is at liberty to treat the matter as an appropriation of the property to their separate use, and claim to be paid one half its value.

As to the manner in which the value was ascertained, the report of the referees is not very specific. But it is to be borne in mind that the property was in the defendants' possession. They had in their power to show with entire accuracy what it was worth, and neglected to give any such proof. When a party is in exclusive possession of the subject matter of enquiry, the adverse party is allowed great latitude in his proof; and here I feel constrained to say, that as the books were given in evidence without objections, and as it appears to me justice was in this particular done between the parties, I should be very reluctant to set aside the report, even if the evidence of *cost* was not in strictness competent evidence of *value*. But here both parties were in attendance on the saloon, and their purchases on joint account must be deemed made by mutual consent, and as between themselves; what they paid was competent as evidence of value at the time of the purchases then mutually agreed to. The deduction of 50 per cent. for depreciation was made, and if the defendants would not, or did not, attempt to show that the depreciation was greater, they ought not complain; I am not aware that there is any presumption that any of the articles were lost; they were brought to the premises for use there. The business was continued without any change, and if any portion were lost or destroyed, I think it was for the defendants, who retained the exclusive possession, to show it.

But upon the ground first above named, the report must be set aside, unless the plaintiff consents to deduct from the amount reported due, the allowance made for goodwill, \$475, and interest \$45 44, in which case judgment is ordered for the residue, \$103 94, with interest and costs. The costs of this motion, \$10, to abide the event of suit.

The case of *Hepburn* and another, appellant, against *William Linden* and *John Fritz*, respondents, reported in our March number, page 80, was heard before Chief Justice Oakley, and Sandford and Paine, Justices, and not before Mr. Justice Sandford, as therein stated.

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VOL. IX.]

NEW-YORK, JULY, 1851.

[MONTHLY PART.]

U. S. District Court.

[*Southern District of New-York.*]

Before the Hon. SAMUEL R. BETTS, District Judge.

THE UNITED STATES v. JOHN L. O'SULLIVAN AND OTHERS.

RIGHT TO HAVE A CASE REMITTED FROM THE DISTRICT COURT TO THE
CIRCUIT COURT.

A case will not be remitted to the Circuit Court from the District Court, except when it shall appear that the questions of law are, in the judgment of the District Court, of so grave a character that it must judicially declare them both *difficult* and important. Nor would a judge be justified in remitting a case to the Circuit Court from the District Court, because he had given a particular exposition to a crime's act in his charge to the Grand Jury, when it is not made to appear that his exposition is in conflict with that of any other court.

The question raised in this motion was, whether on the indictment found by the Grand Jury against the defendants, the District Court were bound to remit it to the Circuit Court. The facts and circumstances sufficiently appear in the opinion delivered by the learned District Judge.

J. Prescott Hall, U. S. District Attorney, for the prosecution.

John L. O'Sullivan, in person.

BETTS, District Judge.—The defendant moved the court, on the indictment found by the Grand Jury against him, that it be remitted to the Circuit Court. The act of Congress of August 8, 1846, (Sess. Laws, 109 ; ch. 98, § 2,) authorizes the United States Attorney, at his discretion, to move the Circuit Court or District Court to remit to the other indictments found in either. And in the 3d section further enacts that the District Court may remit to the Circuit Court any indictment pending in the District Court, when, in the opinion of the court, difficult and important questions of law are involved in the case. The District Attorney opposed the motion for a remittitur, because of the great delay which such course must create, and because

U. S. District Court.—United States v. O'Sullivan and others.

numerous witnesses were attending for the trial of the case on the part of the United States, many of whom were detained in jail, not being able to give recognizances for their appearance. The court asked to be furnished by the defendant with the points of law deemed by him to be of a character to call for the remittitur of the cause, under the provisions of the statute. A note of such points was accordingly given the court. They have been attentively considered, not with a view to determine which way the various suggestions propounded in them should be answered, but to ascertain whether they involve questions of such difficulty and importance as to render it the duty of this court to refer the subject to the Circuit Court. The points of law supposed to arise under this indictment, do not seem to me to assume so grave a character. That the act of Congress may present debatable questions, and demand the decision and construction of the court upon those questions, is highly probable; and it is not to be expected any statutory regulation will ever be expressed in a perspicuity and definiteness of language which admits of no exception or doubt. When one doubt is removed by construction, others spring out of the interpretation itself, and it is a constant occupation of jurists and judicial tribunals to encounter and solve such doubts. It cannot be supposed, therefore, that Congress intended the District Courts should exercise jurisdiction only in cases free of difficulty and not important in themselves, and remit all others of a different character to the Circuit Courts. By the act of August 23, 1842, (5 Stats. at Large, 517, sec. 3,) it is enacted that the District Courts of the United States shall have concurrent jurisdiction with the Circuit Courts of all crimes and offences against the United States, the punishment of which is not capital; and in such of the districts where the business of the courts may require it to be done for the purposes of justice, and to prevent undue expenses and delays in the trial of criminal causes, the District Courts shall hold monthly adjournments of the regular terms thereof for the trial and hearing of such causes. The direction to hold monthly adjournments does not apply to this court, it being required by the act of May 29, 1830, (4 Stat. at Large, 422, sec. 1,) that the District Court of the United States for the Southern District of New-York shall hold a stated term, at the City Hall of the City of New-York, on the first Tuesday of each month. But the provision of the act of 1842 imports a direction to District Courts to exercise the jurisdiction conferred by it, so that delays and expenses may be avoided in criminal cases. The manifest object of the statute would be frustrated, if these courts, on the occurrence of any debatable question of law in a criminal cause, should suspend their action, and remit the case to a Circuit Court. No one can, with reason, suppose such a step proper, unless the questions of law are, in the judgment of the court, of a character that it must judicially declare them both *difficult* and *important*. Those suggested in the memorandum handed me by the defendant may some of them be new, and not yet adjudicated upon in the United States courts, and perhaps were never before presented for consideration. Those circumstances do not, however, necessarily clothe them with the qualities of difficult and important. Questions of construction and

U. S. District Court.—United States v. O'Sullivan and others.

interpretation are incessantly arising in the administration of criminal law. Scarcely an indictment, under a new or old statute, is brought to trial without there being started, and seriously discussed, question after question, vitally important to the defence, or perhaps to the prosecution; yet the District Courts cannot consider they are authorized to disembarass themselves from the consideration and decision of those questions, by adjourning them to the Circuit Court; nor, very often when clearly of the utmost importance in the cause, to declare them *difficult*. The Grand Jury, at the present term, have already brought in thirteen indictments, and yesterday presented six for offences against recent statutes of the United States; all of which last are for offences never prosecuted in this court since I have presided in it. Still it is no less my duty to proceed and hear the new cases than the old, however apparent it may be that points very important to the defence of the parties accused may arise under many or all of them. In the present case it would be most grateful to my own feelings to be relieved of the burthen of the trial; not only because there must necessarily devolve on the court great fatigue and anxiety, in a prolonged and actively contested case, surrounded with many other considerations than the intrinsic merits presented by the issues, but especially because it is plainly signified in this proceeding that the defendant desires by it no less to change the judge than the tribunal. In the points submitted by him, as the foundation of the motion, a paragraph was inserted taking the ground distinctly that the District Judge had, in advance of argument, in his charge to the Grand Jury, given strong and decided views of the law, which would necessarily affect his judgment on the hearing of the cause. It is true the pen was struck through the lines of the paragraph, but evidently not intended so to obliterate them that the sentiment should fail being communicated to the judge. I take no exceptions to the suggestion. The party had a right to make it, and there would have been nothing offensive or indecorous in the objection if expressed openly. Most plainly it affords no legal cause for the judge to decline jurisdiction in the case, or for the party to challenge the propriety of his acting in it. A judge, from his office and station, is presupposed acquainted with the law of the land, and, from study and reflection, to have formed opinions upon the bearing of all positive laws of a general character, on any supposed state of facts. The more extensively and thoroughly he is informed upon those subjects, the better is he qualified for his place. His opinions should not be inflexible nor stubborn, but open to re-examination upon new light or reasons brought to his attention; still, his position is the reverse of that of a juror; instead of having a mind free of all knowledge or impression on the subject to be submitted to his judgment, it ought to be strongly imbued with the law he is to administer, so as to be prepared to apprehend the justness of any criticisms or explanations applied to it; and it matters not if his opinion be in some measure already made up, both on the law and facts of the case, by having acted as committing magistrate on the accusation. Under this theory a party acquires no benefit by appealing or transmitting his cause from one judicatory to another, to avoid its being

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heard by a judge who had formed an opinion upon the meaning of the law, because in every step upwards, from the lowest court to that of last resort, he must be presumed to meet judges of more matured and fixed opinions upon the subject. The policy and advantage of this ascending scale of review is to bring the matter ultimately before those who are prepared, by previous study and experience, to pronounce definitively upon the subject. I cannot think, therefore, that the act of Congress contemplates, or that a judge would be justified in remitting a case to the Circuit Court from the District Court, because he had given a particular exposition to a crime's act, when it is not made to appear his exposition is in conflict with that of any other court. When it is discovered that judges in different sections of the United States put varying interpretations upon the criminal statutes, it is, then, clearly important that the judgment of the Supreme Court should be invoked to give an exposition which shall become a rule to all the tribunals of the country. Independent of these general considerations, I consider it improper to remit causes to the Circuit Court in this district, except in cases of most manifest and grave importance. The Circuit Judge sits in that court only twice a year, and is unable to devote the time necessary to dispose of the business exclusively within its jurisdiction. He might be compelled, in order to clear the jails, to lay aside his civil calendar, and give his attention to cases which, by law, the District Court is required to hear; or he may feel constrained to remand to the District Court the cases originating there and within its jurisdiction, and he would be thus imposing great delay and enhanced expense upon individuals and the government, by reason of improvident concessions of the District Court to parties under indictment. I consider it my duty to dispose of the business cast upon me by the law, and however willing I may be personally to be freed of these particular classes of cases, I discover nothing in them which authorizes me to send them from this court to the Circuit Court for trial. I shall accordingly decline giving the order asked in the present case, and also in those of *Lewis and Schlessinger*.

In the Court of Appeals.

[State of New York.]

December Term, 1850.

Present, Chief Judge BRONSON, Judges RUGGLES, GARDNER, JEWETT, HURLBUT, HARRIS, PRATT and TAYLOR.

CONRAD BOWERS, SURVIVING EXECUTOR OF PETER MARKS, DECEASED, Appellant, against JAMES BROWER, GUARDIAN, &c., Respondent.

Where a legatee filed a bill in Chancery in behalf of himself and all other legatees who might elect to come in under the decree, against executors for the construction of the will of the testator, and payment of his legacy, and a decree was made in such suit declaring that the complainant therein, and certain other persons were entitled to legacies, and such

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other persons did not come in and make themselves parties to that suit, by petition or supplemental bill or on the appeal brought from that decree by the executors; but proceeded by petition before the Surrogate for the payment of their legacies. It was held that such decree in their favor was not *res adjudicata*, and that the executors might contest their right to such legacy.

Where the testator by one clause of his will gave to the children of his sister Catharine a legacy of five hundred dollars each, and by another clause of his will gave to each of his nephews and nieces five hundred dollars, excepting one of his grand-nephews, naming him, and by another clause of his will gave to the children of that grand-nephew, calling him a nephew, collectively five hundred dollars, and the testator left besides the children of his sister Catharine, two nephews and a niece. It was held that the descendants of his brothers and sisters in any degree whose parents were dead were each entitled to a legacy of five hundred dollars; but that those descendants whose parents were living were not entitled—and great-nephews and nieces, and a great-grand-niece of the testator were let in under the term nephews and nieces, their parents and grand-parents being dead.

The 6th section of the revised statutes, volume 2, page 139, which declares: "If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the life-time of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority," is *retrospective* and applies to all marriages whether made before or after the passage of the act—and it was accordingly held that the children of such a marriage were entitled to legacies under the will of the testator, in the same manner as legitimate children, as the testator had died since the passage of the revised statutes, and no rights had vested in other persons.

Judges Bronson, Gardner, and Jewett dissented, holding that the statute was not *retrospective*, and that those children were not entitled to legacies.

This was an appeal from the decree of the Supreme Court sitting in the second district confirming the decree of the Surrogate of the county of Queens, directing the payment of legacies of \$500 to Valentine Kettleman, John Kettleman and Mary Elizabeth Kettleman, infant children of Valentine Kettleman, deceased, a son of the testator's sister Elizabeth, under the fourth clause of the will of the testator, Peter Marks, who died in March, 1845, leaving real estate and personal property of the value of about \$23,000, over and above his debts. He died without issue and his collateral relatives at the time of his death were as follows: John Marks, his brother, Catharine Emerson, a niece who had three children, George W. Marks, a nephew, Martin Marks, a nephew; Nicholas Cromer, John Cromer, Anthony Cromer and Mary Carpenter, who were the grand children of the testator's deceased sister Elizabeth, by her oldest son Nicholas Cromer who was then dead; and the above named Valentine Kettleman, John Kettleman and Mary Elizabeth Kettleman by his deceased son Valentine Kettleman. The testator also left several nephews and nieces, the children of his sister Catharine deceased, each of whom had several children. The testator also left a great-grand-niece; Mary Elizabeth Ferris, who was the only child of a deceased daughter of his deceased nephew, Nicholas Cromer, the father of the above named Nicholas Cromer, John Cromer, Anthony Cromer and Mary Carpenter.

By the will of the testator after giving certain legacies to persons who were not related to him, he gave the use and income of his real and personal estate to his brother John, who was a lunatic during his life, and he directed that the real estate should be sold, after his brother's death, and that the proceeds thereof should be divided between all the heirs and next of kin of the testator. The residue of the personal estate was to be divided in the same manner. Shortly after

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the death of the testator, Anthony Cromer, one of his great-nephews, filed a bill in the Court of Chancery before the Vice Chancellor of the First Circuit against Peter Pinckney and Conrad Bowers, executor, of the last will and testament of the testator, in behalf of himself and other legatees, for the payment of a legacy of \$500 under the fourth clause of the will of the testator. The third, fourth and tenth clauses of the will were as follows: "Item. Third. I will and bequeath unto the children of my sister Catharine each five hundred dollars. Item. Fourth. I will and bequeath unto each of my nephews and nieces five hundred dollars; excepting John Cromer. Item. Tenth. I will and bequeath unto the children of my nephew John Cromer, five hundred dollars." He claimed by the bill that under the fourth clause of the will he, as a grand-nephew was entitled to a legacy of \$500, and that the testator intended to include him and his brothers and sisters under the terms nephew and nieces. The bill stated that the testator after making of the will told the wife of Conrad Bowers, one of the executors, that he had given the Cromers meaning, as he alleged, the complainant and his brothers and sister, \$500 each. This fact was admitted by the answer, but it was said that the testator in the same conversation said that he had not given his niece, Mrs. Emerson, anything. And the defendants insisted that the declarations of the testator to Mrs. Bowers were not admissible as evidence to affect the legal construction of the will. It was also charged in the bill and admitted by the answer that the complainant and his brother Nicholas had at different times resided with the testator, and he had always treated them as near relatives. The cause was heard before the Vice Chancellor. Upon bill and answer, he declared and decided that George W. Marks and Catharine Emerson, the nephew and niece of the testator, and all the grand-nephews and nieces of the testator, and Mary Elizabeth Ferris, his great-grand-niece were entitled to a legacy of \$500 each under the fourth clause of the will of the testator, except John Cromer, who was in terms excluded by the will. But that the children of Catharine Emerson were not entitled to legacies. And the decree authorized the defendants to pay those legacies according to that construction of the will, and the costs of both parties he ordered to be paid out of the estate. The defendants appealed to the Chancellor, who affirmed the decree. After which the above named James Brower was duly appointed the guardian of Valentine Kettleman, John Kettleman and Mary Elizabeth Kettleman above named by the Surrogate of New-York, and then petitioned the Surrogate of the County of Queens for payment of a legacy of \$500 to each of the said Kettlemans, claiming that they were entitled thereto under the fourth clause of the said will and by virtue of said decree. The proof on the part of the petition before the Surrogate showed that the testator had in his lifetime spoken of the Kettlemans as his nephews and nieces, and the executor showed that at the time of the marriage of testator's sister Elizabeth to Kettleman, Cromer had been absent some twelve or fourteen years, but that a short time after the marriage with Kettleman he returned, and that he outlived Kettleman. The petitioner introduced the bill in Chancery in the case of Anthony Cromer against the executors, and

the answers and decrees of the Vice Chancellor and Chancellor in evidence before the Surrogate, and contended that the decree was conclusive as to the rights of the infant Kettlemans, and that the defendants having admitted their relationship to the testator by the answer in that suit, the executor had no right to show that their father was illegitimate; but the Surrogate received the evidence subject to the objection; he, however, decided that the Kettlemans were each entitled to a legacy of \$500 under the fourth clause of the will of the testator, and decreed the payment thereof with costs on both sides to be paid out of the estate. The executor appealed to the Supreme Court where the decree of the Surrogate was affirmed. Whereupon he appealed to this court.

H. H. Burlock, for the appellants, made and argued the following points:

I. The rights of the wards of the respondent were not fixed by the decree of the Vice Chancellor and have not become res-adjudicata:

1st. They had no notice of the filing of the bill in that case, were infants without a guardian, and would not have been bound by the decree, had they been declared not to be entitled to the legacy of \$500 each, under the fourth clause of the will of the testator. (1st Keene, 391; 3d Russell, 130; 1st Mylone and Keene, 200; 1st Barbour's Chancery Practice, 518.)

The notice should be a written one stating the object of the suit, and informing the other legatees that the bill had been filed in behalf of the complainant and all other legatees, who might choose to come in and contribute to the expenses of the suit, in order to conclude such other legatees by the decree to be made therein, and an affidavit of the service of such notice should be filed for the benefit of the executor, in case any of such other legatees should afterwards file a new bill. In this way the rights of all parties would be protected.

2d. They were not parties to that suit, not having come in at any time during the pendency thereof. (*Foster v. Tyler*, 7th Paige, 51.) Nor did they come in and petition to be made parties on the appeal. (*Ibid.*)

3d. They are not entitled to the benefit of the decree of the Vice Chancellor, never having claimed in the Court of Chancery the benefit of such decree, either by petition or supplemental bill. Had they done either, the executor could have made them parties to the appeal, and contested their rights to the legacy under the fourth clause of the will. (*Gifford v. Hort*, 1st Sch. and Lef., 409; *Foster v. Tyler*, 7th Paige, 51, 52; *Cromer v. Pinckney and other Executors*, 3 Barbour's Ch. Rep., 466; In the matter of the City Bank of Buffalo, 10th Paige, 282, 283; *Rogers v. King*, 8th Paige, 210; *Brooke v. Gibbon*, 4th Paige, 374; *Hallett v. Hallett*, 2d Paige, 15; *Ross v. Cary*, *Kettle and wife v. The same*, 1st Paige, 416; *Farnham v. Burroughs*, 1st Dicks. R., 63; *Douglass v. Clary*, do., 393; *Mucher v. Reid*, 1st Ball and Beat., 318; *Goate v. Fryer*, 2d Cox C. C., 201; *Powell v. Walworth*, 2d Med. R., 183; *Cook v. Batton*, Russ. R., 282; *Dixon v. Wyatt*, 4th Med. R., 393; *Houlditch v. The Marquis of Donegal*, 1st

Serin and Ster. R., 491 ; 3d Daniel C. P., 126, 173 ; Mitford's Pleadings, 4th London edition, 29 ; White on Supp. and Revivir, 156.)

II. The proceedings before the Surrogate must therefore be considered as a mere claim of the wards of the respondent to the right of receiving the legacy of \$500 each, under the fourth clause of the will of testator, and of course their rights to such could be contested in the same manner as that of any other claim.

III. The Surrogate erred in decreeing the payment of the legacies claimed by the petition, and he ought not to have decreed the executor to pay the same personally. It should have been out of the estate of the testator. Besides, he should have required the guardian to give security to the minors. (Dayton's Surrogate, 172.)

1st. The wards are not a nephew and nieces of the testator. (*Shelly v. Bryer*, 1st Jacob, 207.)

2d. Because there are persons *in esse* answering the description in the will, and the will cannot be so construed as to let in any not within its terms. (*Fowle v. Kemp*, 5th Han. and John., 135 ; *Gardner v. Hyer*, 2d Paige, 11 ; *Reeves v. Brymer*, 4th Vesey, 697 ; 1st Vesey, Senior, 196 ; *Shelly v. Bryer*, 1st Jacob, 207 ; *Doughty v. Cutter*, 23d Wendell, 513 ; Same case in error, 7th Hill, 305.)

3d. Because such a construction would let in great-nephews and nieces to take equally with their parents. (*Radcliffe v. Buckley*, 10th Vesey, 195 ; *Cutter v. Doughty*, 7th Hill, 305 ; *Shelly v. Bryer*, 1st Jacob, 207.)

This difficulty is got over by the Vice Chancellor by establishing a new rule ; that is, by providing in the decree, that Mrs. Emerson's children are not entitled ; that part of the decree is not at all established by authority, and if the other great-nephews and nieces are entitled, they are also entitled—all must come in or none.

IV. The marriage of the testator's sister, Elizabeth, to Kettleman was void, her first husband, Cromer, being then alive. (*Williamson v. Parisen*, 1st Johnson's C. R., 389 ; Revisors' notes, 3d Volume, 2d Edition R. S., 660 ; Notes to § 5, 6, 7.)

V. The father of the wards of the respondent was therefore illegitimate, and his children consequently not entitled to come in under the fourth clause of the will, as nephews and nieces, conceding great-nephews and nieces to be entitled. They might, no doubt, take by devise if named as nephews and nieces in the will. (*Gardner v. Hayer*, 2d Paige, 11 ; *Collins v. Hoxey*, 9th Paige, 82, 89.)

The provisions of 1st R. L. 1025, § 1 and 2d, R. S. pages 139 and 142, § 6, 22, and 23 are not retrospective and prospective, merely enacting the common law. The revisors in their notes expressly say that § 22 and 23 are new, 3d R. S., 2d edition, 661, note to article 2. Besides, under the § 23 the children of such a marriage are not entitled to the rights of legitimate children, unless so decreed on proof of the marriage being made in good faith on a bill filed to declare the marriage void during the lifetime of the parties.

VI. The appellant had a right to call in question and prove the marriage of Elizabeth, the testator's sister, to Kettleman, to be void, and thus bastardize the issue of such marriage after the death of the parties. Such right is not allowed in proceedings in the spiritual or

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ecclesiastical courts in England, but it can be done in all other Courts. (*Pride v. The Earls of Bath and Montague*, 1st Salkell, 121 ; R. Carb. 271 ; Gomb. 200 ; 4th Modern, 182 ; 7th Coke, 44.)

VII. The wards of the respondent are not, by intendment of law, the children of Cromer, the first husband ; the want of his access was fully proved ; besides, they are called the children of Kettleman both in the bill and petition to the Surrogate. (*Goodright ex dem. Thompson v. Saul et al.*, 4th Term, R. 356.)

VIII. The appellant was not bound by the admission in the answer to the bill as to the wards' relationship to the testator, at least it was not conclusive so as to prevent him from showing that in point of fact such relationship did not exist ; besides, the admission is only stated to be on information and belief.

IX. The Vice Chancellor had no right to make any decree in the suit of Anthony Cromer, as to any one else but him, no one else being before the court, and the decree as to the others must be considered only as advisory to the executors and not binding on them. (*Bower v. Smith*, 10th Paige, 200.)

X. The parol declaration of the testator to Mrs. Bowers, set up in the bill and admitted with an addition in the answer, should not be considered as evidence in these proceedings.

1st. It goes to contradict the will and cannot be received for that purpose. (*Mann v. Manns*, Executors ; 1st Johnson's Chancery Reports, 231, and cases cited ; *Cromer v. Pinckney*, and others, Executors, 3d Barbour's Chancery Reports, 466.)

2d. Because it is not shown to have been made *contemporaneous* with the drawing of the will. (*Nouse v. Finch*, 1st Vesey, Jr., 359 ; *Duke v. Dutchess of Rutland*, 2d Peere Williams, 215.)

3d. Because it is alleged to have been made *after* the will was executed. (1st Maddeck's Reports, 498.)

XI. But if considered as evidence, it does not help the respondent's claim, because a part of such declaration is shown to be untrue by the will itself, viz. : in regard to the testator not having given anything to his niece, Mrs. Emerson. (*Stode v. Russell*, 2d Vernon, 625 ; *Trimmer v. Bynee*, 7th Vesey, Jr., 519 ; Roberts on Wills, London edition of 1809, pages 454, 455 ; Edition of 1815, page 46, vol. 2 ; Edition of 1826, vol. 1, pages 586 to 588 ; 1st American edition, vol. 2, pages 39 and 40.)

XII. The decree of the County Judge acting as Surrogate, and that of the Supreme Court affirming the same, ought to be reversed with costs.

Andrew Thompson, for the respondents, made and argued the following points :

I. Anthony Cromer filed a bill in behalf of himself and other legatees, for the payment of legacies under the fourth clause of the will of Peter Marks, deceased ; upon which a decree was entered on the eleventh day of August, eighteen hundred and forty-six ; which was affirmed by the Chancellor on appeal, June twenty-ninth, eighteen hundred and forty-eight.

II. The executors were the only necessary defendants in this bill, and the bill being filed in behalf of all other legatees, all the necessary parties were before the Court. (3 J. Chan. Rep., 553; 4 do. 199; 1 do. 438; 1 Paige, 20; Id. 270; 2 J. Chan. Rep., 245.)

III. The decree thus made was a complete protection to the executors; and if from deficiency of assets, or new claimants coming in, there should prove not to be sufficient to pay the whole, the suit by such claimants must be brought against the legatees receiving, for re-payment; and cannot be brought against the executors; nor could those having notice of the former suit file a new bill. (1 Keene, 391; 3 Russell, 130; Mitford Pleadings, 135, 139; 1 Mylne and Keene, 200; 1 Barbour Prac., 513, 381, 382.)

IV. The decree in this case directs the executors to pay the costs; and there is consequently no contribution to be made; if there were, it is the complainant's business to claim it, and not the defendant's; this action, is seldom taken and is unnecessary in this case. (Jacob Rep. 243; 1 Russell, 76, 80; 5 Maddock, 447; 1 Bar. Prac., 519.)

V. The rights of the respondents are fixed by the Vice Chancellor's decree, and have become *res judicata*; and therefore all testimony offered by the executors before the Surrogate was properly objected to, and disregarded by the Surrogate in making decrees appealed from. (3 Denio, 238; 4 Paige, 623; 5 Paige, 132; 8 Paige, 210.)

VI. The Surrogate of Queen's County had the right to decree payment of these legacies; and also to enforce payment of the decree by attachment, and the respondents petitioned for such purpose, and the decree of the Vice Chancellor was conclusive proof as to their rights. (2 Rev. Stat., 116 p., S. 16, 20, etc.)

VII. If the meaning of the will be open for argument, and we must now review in this irregular manner the adjudications of other Courts, then we hold the executor has not proved enough to overturn the Chancery decrees. Because:

1st. The bill set forth all the relatives of the testator, and the answer admitted such relationship. Such relationship is also proved by Sarah Cromer, Sarah Kettleman, and was so acknowledged by Peter Marks, the testator.

2d. Elizabeth is dead, and her children also; and the Kettlemans' respondents are Elizabeth's grand-children. Such marriage of Elizabeth cannot be called in question to bastardize her grand-children; more especially after having proved Peter Marks' statements, that his sister had two husbands; and the admission of the executors that the Kettlemans are related in the same degree as John Cromer. (Com. Dig. Bas. B; 2 Phil. Ev. 284.)

3d. The testimony of Michael Feeful, one of the residuary legatees, and Nicholas Andariese, is wholly insufficient to make out sufficient proof for such purpose. Their testimony is contradictory; but both allege a second marriage by Elizabeth. The children of Elizabeth, that bore the name of Kettleman, were by intentment of law the children of Cromer, if he was alive; or, the children of Kettleman if Cromer was dead; and the witnesses essentially contradict each other as to the facts respecting these men. (Com. Dig. Bas. B.)

4th. In another aspect of the case, 1 R. L., 113, S. 1, was a retrospective and prospective statute, but only exempted the party from the crime of felony. The revised statutes re-enacting this statute, says, that certain marriages are void, excepting the case of a marriage after five years' absence, &c.; which might be annulled during the life of the parties, and preserve the legitimacy of the children. With all deference, this statute is retrospective and merely enacts the common law, and the Kettlemans are legitimate. (1 J. Chan. Rep., 389, 488; 2 R. Stat., 139, S. 6—142, S. 22 and 23; Com. Dig. Bas. B.)

5th. If the Kettlemans were illegitimate, they are still descendants of Elizabeth, and can take by devise, and being grand-children of the testator's sister in the same degree as John Cromer, they are in like manner nephews and nieces. (2 Paige, 11; 5 Com. Rep., 228; 1 Term Rep., 97 & 101; Com. Dig. Bas. E.)

VIII. The decrees in Chancery, as well as those now appealed from, are according to the intent of the testator, and are well supported by decisions.

1st. The third clause of the will provides for Catharine's children, and they therefore cannot receive double legacies by taking under the fourth clause, while the designation of John Cromer as a nephew in the fourth and tenth clauses and providing for his children, and the use of the words heirs and next of kin in the first clause, and heirs in the eleventh clause, show an intention of using the words nephews and nieces in an enlarged sense, and to take in all his collateral relatives, but not to give double legacies. (10 Vesey, 195; Ambler, 555, 603, 681; 1 Jacob, 207; 7 Hill, 305; Chan. opinion; 3 Bar. Ch. R., 466.)

2d. The authorities last quoted compel this construction. On the other hand, other authorities prevent the restricted construction, of confining the construction of the fourth clause to Mrs. Emerson and George Marks, the only nephew and niece of the testator, and as children, to carry out the intention, has been held to include grandchildren, and the remotest of living descendants, to prevent a will's failing-of effect; so here, for a like cause, nephews and nieces must be construed to include all those remote collaterals, including Mary Elizabeth Ferris and the infant Kettlemans. (23 Wend., 522, 513; 4 Vesey, 431; Ambler, 555, 681; 1 Edwd. Ch. Rep., 354; 7 Paige, 328; 1 Edwd's, 41; 8 Paige, 375; 6 Bro. C. C., 125.)

3d. This enlarged construction is in accordance with all the decisions, and carries out the intention of the testator. Double legacies are not to be given, therefore Catharine's children are provided for separately; John Cromer being excluded, his children take his place; but Mrs. Ferris being dead, her daughter, Mary Elizabeth, already stood in her place; while the Kettlemans were the reputed nephews and nieces of the testator, and so acknowledged by him, and therefore take under the devise, (whatever may be determined respecting the legitimacy of their father). (2 Paige, 11; Com. Dig. Bas. B.)

4th. If the father of the Kettlemans be deemed illegitimate, still the testator brought him up, acknowledged him to be a nephew, and his sister's child. If in case of descents, children and nephews

and nieces must mean legitimate persons, such meaning is confined to descents ; and those words in other cases, and especially in wills, take the usual and common meaning. (5 Conn. Rep., 228 ; 1 Term Rep., 97 and 101 ; Com. Dig. Bas. E.)

HARRIS, J.—In 1845 Anthony Cromer filed a bill in Chancery against the executors of Peter Marks, deceased, on behalf of himself and such other legatees as might choose to come in and contribute to the expense of the suit. The bill, after setting forth the will, states that the executors, though they had funds sufficient for that purpose, declined paying the legacies to which by the terms of the will the plaintiff and his brothers and sisters were severally entitled, without a decision of some competent tribunal declaring that they were entitled to such legacies. The bill prayed that the executors might be decreed to pay to the plaintiff and to the other legatees their respective legacies. The defendants, in their answer, stated that they had refused to pay the legacies on the ground that the plaintiff and his brothers and sisters were great-nephews and nieces of the testator, and therefore not within the description of persons named in the will, and that there was no other objection against the payment of the legacies. In that suit the court made a decree declaring that the plaintiff and certain other persons therein named, among whom were the three infants, for whose benefit the proceedings in this case are taken, were each entitled to a legacy of five hundred dollars under the fourth clause of the will of Peter Marks, they being nephews to whom legacies are given by said clause, and authorizing the payment of such legacies.

A question is now raised as to the effect of that decree. Is it conclusive as to the rights of the legatees, or is the defendant, as surviving executor, still at liberty to litigate those rights ? On the one hand it is insisted, that inasmuch as the bill, though filed by Anthony Cromer alone, was in fact filed for the benefit of all the legatees standing in the same relation with him, the matters in question in that suit have become *res adjudicata*. On the other hand it is contended, that the infants represented by the plaintiff here, being in fact strangers to that suit, cannot now claim the benefit of the decree by way of estoppel against the defendant.

It is a general rule that the judgment of a court of competent jurisdiction, directly upon the point, is conclusive as between the same parties and their privies upon the same matter in the same or another court. (1 Phil. Ev., 321, 324.) It is also a general principle that a transaction between two parties in judicial proceedings is not binding upon a third party. *Ibid.* The reason is, that it would be unjust to bind any person who could not be permitted to make a defence or examine witnesses, or appeal from a judgment he might think erroneous. The converse of this proposition is also true. A judgment cannot be given in evidence against a party to a former suit by a stranger to that suit, "nobody can take benefit by a verdict," says Baron Gilbert, "who had not been prejudiced by it, had it gone contrary." (Gill. ev., 28. See also *Hursts Cessie v. McNeil*, 1 Wash. C. C. R., 70.) From these principles the inference is very clear, that

the defendant cannot be concluded by the decree in the former suit. The infants represented by the plaintiff in these proceedings were strangers to that suit. It does not even appear that they ever knew of its pendency. If the decree had been adverse to the plaintiff, it cannot be pretended that it would have estopped these parties from setting up their claim to legacies. If not, it follows that the defendant is not now estopped from denying their right. The estoppel must be mutual. The question, therefore, whether these parties are entitled to legacies under the will, is still open for adjudicature. What, then, was the intention of the testator when in the fourth item of his will he said, "I will and bequeath unto each of my nephews and nieces five hundred dollars, excepting John Cromer? For whom were these legacies designed? He had already, in the third clause of his will, given to each of the children of his sister Catharine five hundred dollars. Besides these, there were living, at the time the testator made his will, one nephew and one niece, the children of the testator's brother. There were also living several grand-children of the testator's sister, Elizabeth, one of whom was John Cromer. The question here is, whether these grand-children of Elizabeth were intended to be embraced in the class of relatives described in the fourth clause of the will.

If the clause in question is to be construed according to the ordinary and primary meaning of the terms employed, it is obvious that these persons have no interest in its provision. They are not in that sense nephews and nieces. But the testator had the right to define his own language, and if it can be seen from the context taken in connection with the circumstances of his relatives, that by the terms nephews and nieces he intended some other persons than the children of his brothers and sisters, it is the duty of the court to give effect to that intention. The testator's sister Catharine had long before the time of making the will removed to Canada. The testator was probably not familiar with the situation of her family. He, therefore, by a separate provision in the will, gave to her children, if any, and as many as she might have, each a legacy of five hundred dollars. Besides these children he had but one nephew and one niece. It might well be supposed that he would, after having provided specifically for his sister's children, have made provision equally specific for these other persons standing in the same relation. Instead of this, we find him in general terms bequeathing legacies of five hundred dollars each to all his nephews and nieces, and with a single exception. That exception is John Cromer, who is not a nephew, but the son of a nephew. No one can suppose that the testator meant to give to the children of his sister Catharine double legacies, first under the description of children of his sister and then under the general description of nephews and nieces. Nor, if he had intended to limit the effect of the fourth clause to the remaining nephew and niece, can it be supposed he would have in terms excepted John Cromer from the benefit of that provision. Why not except also the brothers and sisters of John Cromer? From the fact that John Cromer is excepted, and that his brothers and sisters are not, is not the conclusion as irresistible, that the testator intended that the latter

should receive legacies under the provisions of the fourth clause as it is that the former should not? I am satisfied that the true construction of this clause of the will is, that the testator intended to give to each of the children of his brothers and sisters a legacy of five hundred dollars; that if any such child other than the children of Catharine had died, leaving a child or children, every such child, with the exception of John Cromer, should be deemed to be a nephew or niece within the meaning of the term as used in the fourth clause of the will, and that this principle should be applied to the descendants of his brothers and sisters in any degree. This view of the testator's intention is still further supported by the tenth clause of the will, which gives to the children of the testator's *nephew*, John Cromer, collectively the same legacy to which he would have been entitled had he not been excluded from taking under the fourth clause. Adopting this construction, it follows that all the parties claiming legacies as the descendants of the testator's sister Elizabeth, are entitled to such legacies, unless the objection taken to the legitimacy of the three Kettleman children is well founded. That question alone remains to be considered.

It appears from the evidence that Elizabeth, the grandmother of these children, was reputed have been married to Anthony Cromer in Germany. They lived together in this country several years and had several children. Cromer then abandoned his wife and went away. After he had been gone eight or nine years, she, not having heard from him and supposing him dead, was married to Kettleman, by whom she had three children. After the death of Kettleman, Cromer returned, and it appears lived one winter with his wife and then left her again, and has not been heard of since. It is now contended that these facts establish the illegitimacy of the children of Elizabeth by Kettleman, and that these Kettleman children, being the descendants of that unlawful connexion, are not entitled to take under the fourth clause of the will as the nephews and niece of Peter Marks.

It might, perhaps, be urged with some show of plausibility, in answer to this position, that upon a question of legitimacy, there is not sufficient evidence of the marriage of Elizabeth with her first husband Cromer; that when the effect of establishing the prior marriage is to bastardize the issue of the second marriage, higher proof should be required than mere cohabitation and reputation. But I am inclined to think that the fact that they came from Germany, professing to be husband and wife, that they lived together in that relation for several years, and had children who were acknowledged as the issue of such a marriage, is sufficient evidence of a marriage in fact, even though it may have the effect to invalidate a subsequent marriage. A very considerable portion of the population of our country is made up of European emigrants. Of these a large proportion are married when they arrive here, and even when marriages are celebrated here, so migratory are the habits of the American people that in many cases it would be no easy thing to prove a marriage by those who witnessed the ceremony. It was well remarked by CH. J. TELGHAM in *Chambers v. Dickson*, 2 Serg. & R., 475, that "in establishing rules of evidence, arguments from inconvenience have just

weight. And that we must pay great attention to the situation of our own country, which is not in all instances adapted to regulations that are very proper in other countries."

Elizabeth, then, when she intermarried with Kettleman, was the lawful wife of Cromer, and of course the marriage was void. The children of such a marriage, both by the civil and common law, are illegitimate. Has this result been avoided in this case by the operation of statute? The 6th section of the statute relating to marriage, (2 R. S., 139,) declares that if any person, whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void *only from the time that its nullity shall be pronounced by a court of competent authority.*

This statute took effect in 1830. Before that, although there was a statute exempting one married party who married again after five years' continued absence of the other from the penal consequences of bigamy, yet the second marriage was absolutely void. "No length of absence, and nothing short of death, or the judicial decree of some court, confessedly competent to the case, could dissolve the marriage tie." (*Williamson v. Parisien*, 1 John. Ch., 389.) Can this provision of the Revised Statutes be so construed as to legitimate the children of the second marriage? Did the legislature intend that it should be applicable to marriages that had previously taken place as well as to subsequent marriages? There can be no doubt that the marriage in question, had it taken place after the adoption of the Revised Statutes, would have been valid until declared void, upon the application of one of the parties to the marriage or the former husband. (2 R. S., 142, § 22.) Suppose the parties had lived until the Revised Statutes took effect, and then one of them had sought, under the provisions of that statute, to annul the marriage, what would have been the decree of the court? Would it not have been in conformity with the 6th section of the statute, declaring the marriage void *only from the time the decree was pronounced*? I admit the soundness as well as the importance of the principle, that statutes are not to have a retrospective effect. "The very clear essence of a new law," said Kent, Ch. J., in (*Dash v. Van Cleeck*, 7 John, 477,) "is, that it is a rule for future cases. But," says the same learned jurist, "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, even though they might operate in a degree upon existing rights as a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged." (1 Kent's Com., 455.) Suppose the legislature had seen fit, in 1830, to have passed a law in terms declaring the marriage between Kettleman and Mrs. Cromer to be valid, and the issue of that marriage to be legitimate until some competent court, upon the application of one of the parties, should pro-

nounce it to be void, would the validity or the wisdom of such a law be questioned? Had Peter Marks died before the passage of such an act, so that the rights of others in his estate had become vested, then indeed it would have been unjust, if not unconstitutional, to give it such a construction as might destroy rights which had actually attached. But in this case there were no vested rights to be affected by the statute at the time it was enacted. Peter Marks made his will and died long after the adoption of the Revised Statutes. Until those events happened, no one acquired any interest in his estate. No previously existing rights, therefore, would be affected by giving to this statute this retroactive operation.

A question, quite analagous to that under consideration, came before the Virginia Court of Appeals, in *Stones v. Keeling*, 3 Hen. & M., 228. "The legislature of that state had, in 1785, passed a law declaring that the issue in marriage deemed null in law, shall, nevertheless, be legitimate." (Rev. Code Virg., vol. 1, ch. 93, § 19.) This act took effect on the first of January, 1787. Previous to the passage of the act, William Keeling had married Athalia Arbuckle, her first husband, William Arbuckle, being still alive. By this marriage he had two daughters. He had also a son, William Keeling, Jr., whose legitimacy was not disputed. The son died before his father, leaving a widow and children. Upon the death of the elder Keeling, the question arose, whether the daughters or the son's widow, to whom the guardianship of the children had been committed, was entitled to administration. For the daughters, it was contended that, by virtue of the act of 1785, they had become legitimate children, entitled to a share of the estate, and, as next of kin, were also entitled to administration. Upon the other side, it was insisted that the daughters having been born before the act was passed, they were not within its operation. It was held that the statute did apply to the daughters. *Tucker, J.*, said, "The father did not die until the commencement of that act—the rights of the daughters to his property did not commence till his death. The question between these parties did not, nor could it exist until that event, and then the act was in full operation." A similar question afterwards arose in the same court, upon another clause of the same section of the statute, which declares that, "where a man, having by a woman one or more children, shall afterwards marry such woman, such child or children, if recognized by him, shall be thereby legitimated." (*Rice v. Efford*, 3 Hen. & M., 230.) Judge ROANE, in delivering the judgment of the court, after referring to the decision in *Stones v. Keeling*, said, "No objection to this construction can arise on the ground that the act invades private rights. At most, in the case before us, it is only a possibility of an interest that is invaded; a possibility in relation to the children born in wedlock depending upon their surviving their father and his dying intestate. This construction of the act, therefore, however it may be as to the inception of the right, is only prospective as to the consummation of it. It applies to cases where the father has died posterior to the passage of the act."

A construction of the statute in question, which should have the effect to legitimate the issue of marriages of the description men-

tioned, though such marriage had taken place before the act was passed, would neither take away nor impair vested rights. Neither could it produce any injustice or inconvenience. The statute is remedial in its character. The revisers, in their notes, state, that their object in recommending this provision was to mitigate the severity of the common law rule, which declared such marriages absolutely void. The other provisions of the title in which this section is found, are clearly applicable to all marriages prior as well as subsequent. I see no reason for a diversity of construction. I am, therefore, of opinion, that, by the operation of the section referred to, the marriage of the testator's sister, Elizabeth, to Kettleman, was rendered valid until it should be declared void by the decree of a court of competent authority, and that thereby Valentine Kettleman, the issue of that marriage, and the father of these infants, was legitimated.

But for this statute, I should have had great difficulty in giving such a construction to the will as would entitle the Kettleman children to legacies under the fourth clause.

That the testator intended to include them in the class of persons described in that clause, and that he supposed he had done so, I have not for a moment doubted.

Valentine Kettleman, the father of these infants, is proved to have lived with the testator until he was married. He called the testator uncle, and the testator called both him and the Cromers, nephews. It does not appear that he ever dreamed that there could be any question in respect to the validity of his sister's second marriage, or the legitimacy of the children of that marriage. And yet, if in fact the father of these children was illegitimate, I do not see how he or his children could, under the circumstances of this case, be allowed to take under the fourth clause of the will. It is true this was the testator's intention, and it has been well said, that in construing a will, "the intention of the testator is the polar star." But then it is a general rule, that when such general terms as children, sons, daughters, nephews, and nieces, are used, legitimate children only are intended. Illegitimate children may be made the objects of a testator's bounty; but to effect this, they must be clearly designated on the face of the will. Here, these are persons answering to the description in the will. The testator had nephews and nieces who were the legitimate descendants of his brothers and sisters. In such a case, parol evidence to show that by nephews and nieces the testator intended the illegitimate as well as the legitimate descendants of his brothers and sisters, is inadmissible. Had there been no such legitimate descendants, that fact would have created such a latent ambiguity as would have made it proper to resort to extrinsic evidence for the purpose of ascertaining who the testator intended by the general description of nephews and nieces. But, upon this branch of the case, there was no such ambiguity, and, therefore, parol evidence could not be received. I am inclined to think, therefore, that, but for the provision of the Revised Statutes already noticed the real intention of the testator in respect to the Kettleman children must have been defeated. By the operation of that provision, unless I have entirely mistaken its effect, the father of these children became

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the legitimate nephew of the testator, and being such, and having died before the testator made his will, his children, by virtue of the enlarged sense in which the terms nephews and nieces are used in the fourth clause of the will, are entitled to legacies as the nephews and niece of the testator. The decree of the Supreme Court should therefore be affirmed.

N. Y. Superior Court.

(City of New-York.)

Before DUER, MASON and CAMPBELL, Justices.

THE HOWARD INSURANCE COMPANY v. FRANCIS GRIFFIN, CHARLES G. HAVENS, CHRISTOPHER TOWNSEND, AND THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND, AND GEORGE WILDES, impleaded, &c.

(March Term, 1851.)

The equitable doctrine that when lands covered by a mortgage have been sold in separate parcels to different purchasers they are liable for the satisfaction of the debt in the inverse order of their alienation must be considered as the settled law of the state.

Hence when the mortgagee with a knowledge of the facts releases lands primarily liable and of sufficient value to satisfy the debt, those previously conveyed are wholly discharged, nor is it necessary that the mortgagee should have actual knowledge of the equity of the prior purchaser. It is sufficient that the facts known to him made it his duty to enquire.

But the recording of the deed by the prior purchaser is not constructive notice.

Nor is the knowledge of an agent, unless he was bound to communicate the facts during the continuance of his agency.

Whether the possession of the purchaser is constructive notice—*Quere?*

But a recital description in a deed, the contents of which the mortgagee was bound to know, is sufficient to charge him with notice.

Held upon this ground that Plaintiffs had notice of the equity of Defendants, and Bill accordingly dismissed with costs.

Stephen A. Halsey and wife, on the 17th of April, 1837, mortgaged to the plaintiffs about 292 acres of land in the town of Greenburgh, Westchester county, to secure the payment of \$6,000 on the first January, 1838, with 7 per cent. interest, from date. Halsey and wife, mortgagors, on the 10th May, 1838, conveyed 92 acres of the mortgaged premises to the defendant, George Wildes, by a clean warranty deed with full covenants; Wildes, until after this suit was commenced, having had no notice whatever of the existence of the mortgage. The deed to Wildes was duly recorded January 19th, 1839. Halsey, on the 12th of June, 1846, paid to plaintiffs \$4,000, on account of the principal of the debt secured by the mortgage, and \$489 61 on account of the interest; and they thereupon released to John Hunt, the grantee of Halsey, the residue of the mortgaged premises, not embraced in the conveyance to Wildes. The conveyance by Halsey to Hunt was dated the 31st January, 1842, long subsequent to the recording of the conveyance by Halsey to Wildes. At the time when the release was executed and delivered by the plain-

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tiffs to Hunt, the land released to him was of a value more than sufficient to satisfy the whole debt secured by the mortgage. On the 29th December, 1843, Wildes and wife conveyed the 92 acres, conveyed to Wildes by Halsey, to the defendants, Griffin, Havens and Townsend, on certain trusts for the benefit of the defendants, the Governor and Company of the Bank of England, and this conveyance was duly recorded on the 3d day of August, 1844. Previous to the execution of the release by the plaintiffs to Hunt, John J. Storm had gone into the possession of the 92 acres conveyed by Halsey to Wildes, as tenant under the defendants, Griffin, Havens and Townsend, to whom he had subsequently conveyed, and remained in possession until the year 1849. Hunt conveyed the premises, released to him by the plaintiff, to William Paulding, by deed, dated 25th February, 1846, and recorded June 13th, 1846.

For the purpose of establishing notice to the plaintiffs of the conveyance to Wildes at the time when the release was given, it was proved by the defendants, in addition to the recording of the conveyances, and the fact of Storm being in possession under Wildes and his grantees, that the 92 acres, from the time of the original conveyance by Halsey to Wildes, in 1837, had been generally known and designated as the George Wildes' farm. It had also been so designated by Stephen Archer, who was in possession during all the time that Wildes owned it, previous to Storms going into possession, and who gave out that he was in possession under Wildes. It was also proved, that in 1842 the plaintiffs employed Messrs. George W. and George T. Strong, as their solicitors and counsel, to foreclose this mortgage; that searches were accordingly made preparatory to the foreclosure, and that the result of that investigation was, that the names of George Wildes, and Agnes, his wife, were inserted as defendants in the drafts of the bill of foreclosure and notice of *lis pendens*. When matters had proceeded thus far, the proceedings were discontinued by direction of Mr. Havens, the President of the Howard Insurance Company.

The release executed by the plaintiffs to Hunt, also upon its face expressly refers to the conveyance by Hunt and wife to Paulding, and sets forth in which of the parcels described in that conveyance the premises released are embraced; and by referring to that conveyance, that parcel, it appears, is there described as beginning at the north-easterly corner thereof, on the south side of the New-York and Albany post-road, adjoining land now or late of George Wildes, and running thence southerly in three different courses along said Wildes' land.

Wm. Kent and Henry E. Davies, for the plaintiff, made and argued the following points:

I. The right to have the lands which have been sold by the mortgagor, charged in the inverse order of their alienation, is not a legal, but only an equitable right; and the party holding the incumbrance is not bound to regard, and is not affected by the subsequent incumbrances, unless he is informed of the existence of the facts on which this equitable right depends. (*Guion v. Knapp*, 6 Paige, 35.)

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II. The Howard Insurance Company, the first mortgagees on the premises in question, were not bound by, nor affected by the subsequent conveyance by the mortgagor of part of the mortgaged premises to George Wildes.

1. Because no actual knowledge nor notice of this conveyance was brought home to the mortgagee.

2. The recording of the conveyance to Wildes, subsequently to the mortgage, was not constructive notice. (*Stuyvesant v. Hall*, 2 Barb. Ch. Rep., 151.)

3. Neither was any information obtained by George T. Strong, Esquire, while preparing a bill of foreclosure of the present mortgage, in 1842 of any interest of Wildes or his assignees, notice to the mortgagees. Because his information was not communicated to the mortgagees. Mr. Strong was solicitor for the mortgagee in an inchoate and isolated transaction, which was abandoned before it reached a suit in Chancery, and therewith his agency terminated.

The rule, which makes the principal liable by notice to his agents has this qualification, viz.: "that notice to the counsel, attorney or agent, to bind the principal, must be in the *same transaction*."

A notice then given in 1842, to a solicitor or counsel, who never foreclosed the mortgage, and whose functions ended with some preliminary preparations for a suit, cannot affect the mortgagees, to whom his information was never communicated, in a different transaction, and at different time, viz.: in their release to Hunt, on 12th June, 1846. (2 Sugden on Vendors, "9th ed.," p. 278; *Preston v. Tubbin*, 1 Vernon, 286; *Ashley v. Bailie*, 2 Vesey, Senior, 368; 2 Atkins' R., 242; *Hamilton v. Royse*, 2 Sch. & Lef., 327; *Bank of U. S. v. Davis*, 2 Hill, 451.)

III. The plaintiffs are entitled to the usual decree, with costs.

D. Lord, for the defendants, made and argued the following points:

I. By the conveyance of the 92 acres by Halsey to Wildes, the mortgaged premises became thereafter liable to the payment of the mortgage debt, in the inverse order of their alienation, that is to say: the premises afterwards released by the plaintiffs to Hunt, primarily liable, and the premises conveyed to Wildes, liable only in the event of the residue proving not sufficient to satisfy the mortgage. And Wildes and his grantees would have had the right to insist on the filing of a bill to foreclose against the whole property, that the plaintiffs should exhaust their remedy against the other portion, before resorting to the 92 acres. (*Kellogg v. Rand*, 11 Paige, 59, and cases cited in arguments of respondent's counsel.)

II. The plaintiffs were chargeable with notice at the time when they released the 200 acres conveyed to Hunt, that the 92 acres had been previously conveyed to Wildes.

1. The deed to Wildes had been many years on record.

2. The 92 acres had been for many years known and designated as the George Wildes' farm.

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3. Before and at the time of the delivery of the release, the witness, Storm, was in possession of the 92 acres under the defendants, Griffin, Havens and Townsend, the grantees of Wildes, as Archer had previously been, from the time of the conveyance to Wildes under him.

4. The plaintiffs had notice, through their solicitor and counsel, employed to foreclose the mortgage in 1842, of the title of Wildes. Notice to their solicitor and counsel was notice to them, and the testimony also shows, that they were cognizant of the investigation of the title, which was being prosecuted by their solicitor.

5. The release executed by the plaintiffs to Hunt, upon its face expressly refers to the conveyance by Hunt and wife to Paulding, and sets forth in which of the parcels described in that conveyance the premises released are embraced. And by referring to that conveyance, it will be seen that parcel No. 1, (one of those released,) is there described as "beginning at the north-easterly corner thereof, on the south side of the New-York and Albany post-road, adjoining land now or late of George Wildes, and running thence southerly in three different courses along said Wildes' land. And on the map annexed to the deed, the premises in question are laid down as land of George Wildes, Esq.

On the subject of notice, see *Fraser v. Western*, 1 Barb. Ch. R., at p. 232, and the cases cited there.

III. The plaintiffs, therefore, having released the two hundred acres of the mortgaged premises conveyed by Halsey and wife to Hunt, and by Hunt to Paulding, with notice of Wildes' title to the remaining 92 acres, and the land released having been, by the plaintiffs' admission in the case, of a value more than sufficient to satisfy the mortgage debt, the premises now in question are in equity discharged from the mortgage. (*Guion v. Knapp*, 6 Paige's R., 42; *Stuyvesant v. Hone*, 1 Sandford's Ch. R., 419; *Stevens v. Cooper*, 1 Johns. Chan. R., 425; *Parkman v. Welch*, 19 Pickering, 231; *Pathy v. Pease*, 8 Paige's R., 277; *Cheesebrough v. Millard*, 1 Johns. Ch. R., 414; *Neimeureux v. Gahn*, 3 Paige, 614, S. C., on appeal, 11 Wend., 312.)

IV. The plaintiffs' bill should therefore be dismissed with costs.

DUER, J.—It may be true, as Mr. Justice Story has suggested, that some exceptions from the equitable doctrine upon which this defence is rested, ought to be admitted; but the doctrine, as supplying a general rule, has been too firmly established by repeated decisions to be now shaken; nor is it pretended that there are any circumstances in the present case that can lay a ground for an exception. The doctrine is, that when a mortgagor sells a portion of the lands which the mortgage covers, those which he retains become primarily liable for the satisfaction of the debt, those which he has conveyed being answerable only for an eventual deficiency; and, as a necessary consequence, that a similar equity prevails between purchasers, so that distinct parcels or lots of the mortgaged lands, which have been conveyed at different times to different purchasers, are chargeable in their reverse order of their alienation, and must be sold in that order un

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a decree. The equity which may thus have been created between a purchaser and the mortgagor, or between several purchasers, the mortgagee, when he has a knowledge of the facts, is not permitted to disregard or disturb, and, with this knowledge, he acts at his own peril when he releases from the lien of the mortgage any portion of the lands which it embraces. If the lands released are primarily liable, and are of sufficient value to satisfy the debt, those previously conveyed are wholly discharged, and in no case can they be charged with any larger sum than the proportion of the debt that may remain unsatisfied when the value of the lands released has been applied and exhausted.

As these rules are undisputed, and it is admitted that the value of the lands which were released by the plaintiffs, the Howard Ins. Co. to J. Hunt, in April, 1846, exceeds the whole amount of the original debt, the only question necessary to be considered, is, whether the Company, at the time of the execution of the release, are chargeable with notice that the 92 acres, not released, and upon which they meant to retain their lien, had been previously conveyed. If notice cannot be justly imputed to *them*, their lien is retained, and they are entitled to a decree. If they *are* chargeable with notice, actual or constructive, their lien upon the lands thus conveyed is wholly gone, and the bill as to the defendants, now before us, must be dismissed.

The deed for the 92 acres to G. Wildes, from whom the other defendants derive their title, was recorded in the proper Clerk's office several years before the execution of the release; but we agree with Chancellor Walworth, (*Stuyvesant v. Hall*, 2 Bar. Ch. R., 151,) that the recording of a subsequent deed from the mortgagor cannot operate, *per se*, as notice to the mortgagee; since, by the plain terms of the statute, the constructive notice which arises from the recording of a conveyance is limited to subsequent purchasers of the lands which it embraces. Yet the fact that this deed was recorded, is not to be regarded as wholly unimportant; since, if it shall appear from other circumstances that the plaintiffs were bound to inquire, the record of the deed is evidence that an enquiry, properly conducted, must have led to a knowledge of its existence.

Nor shall we lay much stress upon another circumstance, upon which a good deal of stress was laid in the argument, namely, that the existence of the conveyance to Wildes was ascertained in 1842, by the attorney and agent, who was then employed by the plaintiffs to foreclose the mortgage. It is true, as a general rule, that the knowledge of an agent is, by construction of law, the knowledge of his principal; but the sole grounds of this imputation are, that it is the *duty* of the agent to communicate to his principal all the facts which have been ascertained by him in the course of, and relating to the subject of his agency, and this duty, when it has attached the law, presumes to have been discharged. (Story on Agency, § 160, 208.) In this case, however, by the sudden discontinuance of the proceedings in the foreclosure suit, the agency of the attorney was terminated before his enquiries were completed, and at any rate before it was necessary for him, or it became his duty to communicate

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their result to the plaintiffs. As the reasons for the communication had ceased, the obligation also ceased. Hence, since the duty of communication never attached upon the attorney during the course of his agency, there is no room for the presumption that it was actually made; the ground of the presumption wholly fails; and that the communication was not in fact made, we think the evidence shows.

But there are other facts in this case of far greater significance and value than those to which we have adverted. It appears from the evidence, that Wildes took possession of the lands conveyed by his agent or tenants, immediately, or shortly after he received the deed, and that the fact of his possession was so public and notorious, that it was generally known in the vicinity that he was, or claimed to be, the owner. When lands contracted to be sold, are in the actual possession of the vendee, his possession is notice of his equitable title to all persons, who may subsequently deal in relation to the same lands with the vendor, so that a subsequent purchaser, who has paid the full value of the lands, in total ignorance of the contract, is yet bound by its terms, and may be compelled to execute its provisions by a conveyance of the legal title which he had acquired. We are not prepared to say that this rule, which is constantly applied to a subsequent purchaser, may with equal justice be applied to a prior mortgagee. There is undoubtedly a distinction that may prevent this extended application; yet, it may deserve consideration, whether a knowledge of the actual state of the possession and of the title and claims of those holding the possession may not, even with greater reason, be imputed to the mortgagee than to the purchaser. His existing relation to the lands makes it his interest, generally speaking, to possess the knowledge, and it therefore seems a fair presumption that he has not neglected the means of acquiring it. The actual question has never been decided, nor is it necessary that it shall now be determined, since there are other grounds upon which, with more satisfaction to our own minds, and as we cannot but think, with a very slight hazard of error, we may place the judgment we intend to deliver.

The last and most material allegations on the part of the defendants are that the plaintiffs, by the very terms of the release to Hunt, had notice that George Wildes was then the owner of that portion of the mortgaged premises which, with a view to retain the lien of the mortgage, was excepted from the operation of the release, and that the notice, if not direct and positive, was yet sufficient to put them upon enquiry, and by a legal consequence to charge them with a knowledge of all the facts which upon inquiry they would have ascertained. The release embraces three distinct lots or parcels of land, and in giving the boundaries of parcel No. 3, closes the description with these words, "being part of the same premises conveyed to William Paulding, &c., by the said John Hunt and Mary his wife, by the deed bearing date the twenty-fifth of February last past, and are therein described as parcels 1, 3 and 4 (one, three and four.*)" It was candidly admitted by the counsel for the plaintiffs that the necessary effect of this reference to the Paulding deed was

Superior Court.—The Howard Insurance Company v. Francis Griffin and others.

to adopt and incorporate into the release the description which is there found, and that the release must therefore be construed precisely as it would have been had this description, instead of being referred to, been literally transcribed.

In the deed to Paulding, parcel No. 1, (which we have seen is included in parcel No. 3 in the release,) is partly described as follows: "Beginning at the north easterly corner and adjoining land *now or late of George Wildes*, and running thence southerly in three different courses along said Wildes' land;" the land thus described as being "*now or late of G. Wildes*," being exactly that part of the mortgaged premises which Halsey had conveyed to him, and upon which the sum remaining due upon the mortgage is now sought to be charged.

It was not denied by the counsel for the plaintiffs that this descriptive clause had the words "or late" been omitted, would have amounted to a positive notice to the plaintiffs of the prior title and equity of Wildes'; it would have been evidence of their actual knowledge of the facts upon which his equity and that of his grantees depends. But it was contended that by the insertion of the words "or late," the clause, as conveying notice, was rendered wholly inoperative, since these words might, with as much propriety, be referred to a time anterior to the execution of the mortgage, as to any subsequent period. In short, that the clause, as it stands, means only that at some period or other one George Wildes had been the owner of the land to which it refers. Could we assent to this as the true construction of the clause, we should still hesitate to say that the notice which it conveyed was not sufficient to create an obligation to enquire, but we cannot think that the words of the clause ought to be thus construed; such is not their natural interpretation; nor is it the meaning, we are satisfied, which they conveyed at the time to the minds of the parties. When lands are described in a deed as "*now or late of A. B.*" the plain and obvious meaning is that A. B. was the last person who was known to the parties as the owner, and that they still believed him to be so, but inserted the words "*of late*," to guard against the possible contingency of a conveyance by him to some person then unknown. It may be true that such a descriptive clause, having reference to boundaries only, and not to the lands conveyed, is not unfrequently copied from a prior conveyance, and in many such cases is not understood by the parties as a representation of existing facts; still the true and primary meaning of the words is that which we have stated, and except when they are known to be a mere transcript from a prior deed, it is this meaning which they naturally, if not necessarily, suggest to the mind of a reader. The presumption, that it was in this sense that the words "*now or late*" were understood and *meant* to be understood in this case, is greatly strengthened by the circumstance that the clause in which they are found describes the line of boundary in its continuance, "*as running along said Wildes' land*," words so positive that it is quite improbable they would have been used, had not Hunt, whose words they are, believed that Wildes was then the owner; and it must be remem-

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bered that the plaintiffs, when they adopted the words of Hunt, were bound to consider in what sense he probably employed them.

Let it be admitted, however, that the words "land now or late of G. Wildes" are not equivalent to a declaration of the belief of the parties that Wildes was then the owner, it cannot be denied that they are evidence that they deemed it to be possible that he was so, and the admission of this possibility, under the circumstances of this case, was alone a sufficient notice to put the plaintiffs upon enquiry. Such a possibility could not have existed at all, Wildes could not then have been the owner, had not the land been conveyed to some person by Halsey, the mortgagor, in the interval between the execution of the mortgage and that of the general assignment to Hunt, for had there been no such conveyance, Hunt himself, when he executed the deed to Paulding and when the release was executed, would have been in the possession of the land as owner, and could therefore never have admitted the possibility of an existing title in another person.

And this circumstance, we must remark, furnishes a complete answer to the argument upon which the able counsel for the plaintiffs chiefly insisted. It is doubtless true that when lands adjoining those which are conveyed are described in a deed as now or late of a third person, the descriptive clause is frequently repeated, without alteration, in successive conveyances, although from the lapse of time or change of circumstances, it has wholly lost its original meaning, and is no longer a true expression of the facts which it asserts; but we are persuaded that this only happens when the lands still remain in the occupation of strangers, or strangers are still believed to be the owners. We cannot believe that the owner of lands that in former deeds have been thus described, when he is himself a party to a conveyance of adjoining land, would permit the insertion of a clause, which he not only knows to be false, but which involves in its falsity a disclaimer and denial of his own title. Had there been no prior conveyance by Halsey of the land described as now or late of Wildes, we have seen that Hunt must necessarily have been the owner when he conveyed to Paulding, and had such been the fact it would be unreasonable to doubt that the land would have been described as his in the conveyance. It would have been designated as "other land of said Hunt," or "of the party of the first part," or by other words of equivalent import.

Were it possible for us, then, to concede that the words "now or late of G. Wildes" are so vague and equivocal that they ought not to have been understood by the plaintiffs as conveying any affirmation of the actual or recent ownership of Wildes, they certainly implied and must have been understood by the plaintiffs as implying, that no title was then vested in Hunt, and the notice thus given to them that Hunt was not then the owner, was equivalent to notice of a prior conveyance by the mortgagor, since they knew that all the lands which the mortgage covered, had no portion of them been previously conveyed by Halsey, must have passed to Hunt by virtue of the general assignment. They could not have released to him without knowing that he was the owner of the equity of redemption in

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the lands released, and they must therefore have known by what title he became so.

Hitherto we have made no mention of the map which is annexed to the deed to Paulding, and upon which the learned counsel for the defendants laid a good deal of force in his argument; we have not done so for two reasons: we have considerable doubts whether the map can be properly regarded as embraced by the reference that is made in the release, so as to charge the plaintiffs with a knowledge of its existence and contents, and we have no doubt that without the introduction of the map, the proof of notice is sufficient.

It is, indeed, very possible, and it may even be admitted, as very probable, that neither the release, nor the deed to Paulding, were read, or even slightly inspected by the officers of the company when the release was executed; but it is needless to cite authorities to show that in all cases it is a presumption of law that the contents of a deed were known to the parties before its execution, and that except in cases of actual fraud, this presumption precludes them, when the rights of a third person are concerned, from averring their ignorance. We must, therefore, decide the case now, precisely as we must have done, had there been positive evidence that the clauses in the release and in the deed, upon which the allegation of notice is founded, were carefully read by the officers of the company before or at the time of the execution of the release. Reasoning then, as we are bound to do, upon this presumption of law as a fact, the conclusion, it seems to us, is necessary and irresistible, that the information thus given to the plaintiffs, if not positive in its nature, yet rendered the fact of a conveyance by the mortgagor prior to his assignment to Hunt of the land not embraced in the release, so probable that a further enquiry, for the purpose of ascertaining the fact, became their immediate and imperative duty; and the rule of law that must govern our decision, is as inflexible as it is just, that he who is bound to inquire before he performs an act by which he has reason to believe that the rights of others may be affected, is chargeable with a knowledge of all the facts that an enquiry, properly made, would have disclosed to him. If his actual knowledge would have rendered his act, as affecting the rights or equities of others, illegal and void, such is also the necessary effect of the knowledge which, when he omits to inquire, the law imputes to him. (*Green v. Stryker*, 4 John Ch. R., 47. *Pendleton v. Fay*, 2 Paige, 204. *Sigourney v. Mason*, 7 Cow., 313. *Fraser v. Weston*, 1 Barb. Ch. R., 220, 232. *Kennedy v. Green*, 3 Mylne, and Keene, 99.)

Although the internal evidence of the transaction between the officers of the company and Hunt, if we chose to dwell upon it, might not improbably lead us to the conclusion, that the parties, in making the agreement which was consummated by the release, acted, not at all in ignorance of the facts, but only under a mistake, a serious though very common mistake as to the law, yet we are not prepared to say that there is sufficient proof of the actual knowledge of the plaintiffs to justify us in making it a ground of our decision; but of that knowledge which the law imputes to those who are bound, yet omit to enquire, the proof is, in our judgement, ample and conclusive.

N. Y. Superior Court.—*Chalmers v. James.*

A Decree must therefore be entered, declaring in substance, that as the plaintiffs, when they released to Hunt a portion of the mortgaged premises exceeding in value the whole amount of the mortgage debt, had notice that the lands not embraced in the release, and which they seek by their bill to charge with the payment of the sum remaining due upon the mortgage, had been conveyed by the mortgagor before those which they released, the lands not released are wholly exonerated from the lien of the mortgage, which, in respect to them must be held to be satisfied. Consequently, the bill as against the defendants now before us must be dismissed with costs.

Before DUEK and CAMPBELL, Justices.

[*June General Term, 1851.*]

ALEXANDER CHALMERS *ads.* FREDERICK P. JAMES.

The presumption of law that the holder of a promissory note is its owner, is not repelled by showing that it came into his hands after it was due.

Proof of a valuable consideration is only necessary to be made when a defence is set up, which, unless the plaintiff was a purchaser for value and without notice, would conclude him.

In all other cases a plaintiff who sues as an endorsee, and proves his title as such, is to be deemed the real party in interest under § 111 of the Code.

These points assented to by all the judges, *Brisbane v. Pratt* (4 Denio, 63), is not to be construed as sanctioning an opposite doctrine.

Order at Special Term, denying a re-hearing, affirmed with costs.

This was an appeal from an order made by Mr. Justice Paine at Special Term, denying a motion on the part of the defendant for a re-hearing.

The action was brought by the plaintiff, as endorsee of a promissory note, against the defendant as maker, and the referee (M. Ulschoeff, Esq.) had reported that the plaintiff was entitled to recover the full amount of the note, with interest. It appeared from the report, that the note was given to Adams & Brownell, and was endorsed by them; that before it was due they transferred it, for value, to one Lucius S. Beardsly, who sold it, after its maturity, to one Wm. M. Parks, from whose hands it passed into those of the plaintiff, but it did not appear that any consideration passed from the plaintiff to Parks. The title of the plaintiff was put at issue by the pleadings.

J. Aitken, for the defendant, insisted that as it did not appear that the plaintiff had given any value for the note, and it was certain that he received it after it was due, it was a presumption of law that he was prosecuting the suit for the benefit of Parks, and the Court was therefore bound to say that he was not the real party in interest, and under the Code, § 111, had no right to maintain the action. He relied upon the case of *Brisbane v. Pratt* (4 Denio, 63), in which

N. Y. Superior Court.—*Chalmers v. James.*

Mr. Justice Jewett said that the holder of a promissory note, under the like circumstances, is to be deemed a mere trustee, as a controlling authority.

W. C. Betts, for the plaintiff, was stopped by the Court.

DUER, J.—There is no exception from the rule, that the holder of a promissory note sufficiently proves his title as owner by the production of the note, and proof of the signatures of the maker and endorser. Whether the note came into his hands before or after it was due, he is not required to show that it was transferred to him for value, unless a defence is set up that would otherwise conclude him. Where no defence is interposed, even his admission that he paid no value, would not destroy his title as owner. The mere delivery of a note, if not accompanied with a trust, would be sufficient to vest an absolute title, since unexplained it would be evidence of a gift. If the plaintiff is a trustee for Parks, the proof rested upon the defendant.

The observations of Mr. Justice Jewett, in *Brisbane v. Pratt*, must be understood in reference to the particular circumstances of that case, in which a defence was set up that could only be met by proof that the plaintiff was a bona fide holder for value. Whether in that case the declarations of a former holder were properly admitted in evidence to impeach the title which he had passed, is a question that we are not now called upon to consider.

Although we can see no reason for doubting that the order appealed from must be affirmed, we shall suspend our judgment until we have consulted our brethren, and if the question shall be regarded by them as at all doubtful, the case shall be called again upon an early day.

Upon consultation, the Judges were all of opinion that a further argument was unnecessary, and that the order at Special Term should be affirmed.

June 21st. The order was accordingly affirmed and final judgment rendered for the plaintiff.

In the Exchequer Chamber.

[*Copyright Case.*]

Before LORD CAMPBELL, Chief Justice of the Court of Queen's Bench, and PATTERSON, MAULE, COLERIDGE, CRESWELL, and TALFOURD, Justices.

BOOSEY v. JEFFREYS.

A foreigner by sending to and first publishing his works in Great Britain may acquire a copyright.

The opera of *La Sonnambula* was composed by Bellini, at Milan, in February, 1831. On the 19th of that month, Bellini, duly complying with all the forms required by the law of Milan, assigned his copyright in the opera to Signor Riccordi, a Milanese. In June of the same year, Riccordi went to England, and assigned the copy-

Exchequer Chamber.—Boosey v. Jeffreys.

right to Boosey, the plaintiff. The opera, having been so assigned, was published by Boosey, in London, on the 10th of the same month, *it never having been before published in England or in any other country.*

An action was brought by the plaintiff Boosey, against the defendant Jeffreys, for "pirating and using" a cavatina from this work, and was tried before Lord Cranworth, (then Baron Rolfe,) in the Court of Exchequer, and the court held under the copyright act, (8 Anne, c. 19, s. 54,) that the plaintiff, under the circumstances, obtained no copyright. His Lordship observed (on that occasion): "The object of the legislature clearly is not to encourage the importation of foreign books, and their first publication in England as a benefit to this country, but to promote the cultivation of the intellect of its own subjects; and, as the act of Anne expressly states, 'to encourage learned men to compose and write useful books,' by giving them as a reward the monopoly of their works for a certain period, dating from their first publication."

The case was taken to the Exchequer Chamber, sitting in error, and very learnedly argued.

On Tuesday, the 19th May, the decision of Baron Rolfe was reversed, and a new trial ordered.

LORD CAMPBELL delivered a very elaborate judgment; after going over the facts he observed: "After listening to a very learned argument, we are all of opinion that the evidence is sufficient to entitle the plaintiff to a verdict on both the issues, and therefore there must be a *venire de novo*. The Court sees no reason for thinking that it was the intention of the legislature to exclude foreigners from the benefits of the statutes. The British Parliament has no power to legislate for aliens beyond the British territory, but within the limits of that territory it has the power; and the court conceives that the general words must be presumed to do so. The monopoly which the statutes conferred is to be enjoyed here, and the conditions for the enjoyment of it are to be presumed here. What is there to rebut the presumption that aliens are entitled? The statute, 8 Anne, c. 19, is for the encouragement of learning, by vesting the right in printed books in the authors thereof. Assuming that the legislature intended this expressly for the encouragement of learning in Great Britain, might it not be for the encouragement of learning that foreigners should be induced to send their works here to be first published? If Rapin and De Lolme had written their valuable works on our constitution on the continent, without visiting this country, instead of first publishing them as they did in England, is it to be contended that they would thereby have been debarred from assigning their property in these works to an Englishman? The real question is, whether a foreigner, by sending his work to a publisher here, can acquire a copyright in it. Upon that question depends his right to assign to another. It is admitted that if a foreigner compose his works here, he may acquire a copyright in it; and the learned counsel for the defendant do not deny that if a foreigner, while living here for a temporary purpose, write a poem, he may

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publish it and acquire a copyright in it here. If he had composed it in his own country, and brought it over in his memory and produced it here for the first time, or if he had written out a book in manuscript, would it have made any difference as to his rights? Could his personal appearance within our realm be essential to his right as an author, if he did that by an agent which it is not disputed he might do in his own proper person?"

A new trial was accordingly ordered.

REPORTS OF CHANCERY CASES decided at the First Circuit of the State of New-York, by the HON. WILLIAM T. MCCOUN, VICE CHANCELLOR. BY CHARLES EDWARDS, Counsellor at Law. VOL. IV. New-York, BANKS, GOULD & Co., 144 Nassau Street. Albany, GOULD, BANKS & Co., 475 Broadway. 1851.

This volume is the last of a brief series comprising a greater variety of decisions upon points of practice and ordinary matters of Chancery jurisdiction than almost any other works of the same compass known to the profession. Their value to the practitioner has long been recognized, and this volume containing the later adjudications of the learned Vice Chancellor has been eagerly looked for, and as far as our observation has extended, been received with a hearty welcome. The whole series comprise a most excellent commentary upon many matters not elsewhere reported, and are indispensable to any well selected law library. We feel assured this is not saying too much, for although, from association endearing these volumes to the recollection of most of the profession now living in this city, they have a peculiar local value; still they possess an intrinsic worth which give them a place in the first rank wherever the great equity system of England is administered.

The sight of this book recalls associations and revives memories that time had begun to efface. Who has forgotten—who can ever forget the pleasant days gone by, when it was a pleasure to argue an equity motion? when each solicitor knew what he was asking for, and knew when he had gotten it, and when it was refused? Who of the profession of this city does not recall with delight the by-gone days when in the old room in the east wing of the City Hall the most momentous questions were discussed, and the most valuable rights of men adjudicated, without the confusion, hurry, fuss and trouble of these modern days, when we have a system of procedure (created *a priori* in a few months by three men,) substituted for the settled maxims which upwards of three hundred years and the experience of millions of a learned profession had established. "There was a time" when the idea of a "special motion" did not instantly fill the mind with horrible apprehensions of days and weeks passed in "anxious vigils" amid a hundred others pressing they knew not whether, and asking for they knew not what. It is doubtless unbecoming to be thus a "*laudator temporis acti*," but it does seem to us that the learned Vice Chancellor whose reports are before us habitually

Punch on Special Pleading.

passed upon the most important questions of practice of the day with a quiet dignity and facility that might reasonably be envied in our "troublesome times."

This volume, with the three others previously issued, contain all the decisions of importance made by the Vice Chancellor of the first Circuit, from May, A. D. 1831, to October, 1846, when "the then constitution of the State of New York made the period to his judicial duties." To adopt the language of the Reporter: "On the thirteenth day of September, 1846, His Honor Vice Chancellor McCoun announced to the bar of his own court that he had then 'arrived at the end of his judicial labors,' and that his 'task was accomplished.' While all who know Mr. McCoun are aware that his love of truth is equal to his great desire for justice, yet the people have a gratified knowledge that he did not speak prophetically when he said, 'I have now arrived at the end of my judicial labors;' for at their first election of judicial officers his Honor was made a Justice of the Supreme Court of the State of New-York," and we might add, in the usual routine of its new system, is now sitting as a Justice of the Court of Appeals.

There are reprinted in this volume nearly two hundred and fifty cases, embracing a period of four years. The marginal notes, so far as we have had leisure to examine, seem exceedingly concise and accurate, and the statement of the case, where practicable, condensed in such a manner, as in these days of loose reports, is very gratifying to the hurried investigation of causes. The typography and style of the book is clear and neat and tasteful.

We had contemplated a notice of some two or three of the leading cases reported in this volume, but cannot in the present number. At a future day we purpose a fuller review of the whole series. Meanwhile we can heartily recommend these volumes to the profession. More especially are they valuable to the bar of this city, containing, as they do, so much current law and so many cases familiar here, but known hitherto only in manuscript.

P. S.

ANTHON'S NISI PRIUS.

It will no doubt be gratifying to the Bar to learn that a new edition of this work, with additional notes and cases, in a form worthy the reputation of its learned author, is in press, and will shortly be published by Messrs. Banks, Gould & Co., Law Booksellers, of this City.

PUNCH ON SPECIAL PLEADING.

THE DECLARATION CONTINUED.

If JONES has been given into custody by SMITH without sufficient reason, and JONES brings an action for false imprisonment; instead of saying "he was compelled to go to a station house," he declares that the defendant "with force and arms, seized, laid hold of, and

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with great violence pulled and dragged, and gave, and struck a great many violent blows and strokes, and forced and compelled him—the plaintiff—to go in and along divers public streets and highways, to a police office; whereby the plaintiff was not only greatly hurt, bruised and wounded, but was also kept.

If Snook's dog bites Thompson's pet lamb, Snooks declares "That defendant did wilfully and injuriously keep a certain dog, he—the defendant—well knowing that the said dog was and continued to be fierce and mad, and accustomed to attack, bite, injure, hurt, chase, worry, harass, tear, agitate, wound, lacerate, snap at, and kill sheep and lambs; and that the said dog afterwards, to wit: on the — day of — and divers other days, did attack (pp. down to) and kill one hundred sheep and one hundred lambs of the plaintiff; whereby the said sheep and the said lambs (it will be remembered there was only one lamb,) were greatly terrified, damaged, injured, hurt, deteriorated, frightened, depreciated, floored, flustered, and flabbergasted, to the damage of the plaintiff of £—, and therefore he brings his suit."

The various forms of declaration are so numerous, that they fill a volume of 700 large pages of Chitty, who is quite chatty on this dry subject, so much does he find to say with regard to it. To this able and amusing writer we refer those who are curious to know how a schoolmaster may declare for "work and labor, care, diligence, and attendance of himself, his ushers and teachers, there performed and bestowed in and about the teaching, instructing, boarding, educating, lodging, flogging, enlightening, thrashing, washing, whipping, and otherwise soundly improving divers infants and persons." These, and almost all other conceivable causes of action, are dealt with fully in the pages to which we allude, and therefore all who wish to treat of going to law, are referred to the teacher alluded to.

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NEW-YORK, AUGUST, 1851.

[MONTHLY PART.

THE CONTRACT OF ENDORSEMENT.

When the Court of Appeals decided in the case of *Warden & Griswold, at the suit of the Cayuga County Bank*, that the holder of a promissory note might break down the notice of protest served, and recover upon a note, *different from the one* mentioned and described in the notice, it was evident that thereafter it would always be more safe and prudent not to describe the contract at all, as it would be much easier to *fill up a blank notice* at the circuit by the introduction of "accessory facts," than it would be to *break down* an affirmative notice, and *then*, build up a *new one*, in *opposition to it*. Hence, discreet notaries, instead of giving a "complete specification of the bill or note in the notice of dishonor," as was *formerly* required of them, have adopted the more safe and prudent rule of saying as little about the note they protest as they conveniently can, as may be seen by the following report of a case recently tried in Ontario County. In that case, it is true, the notary described the note as an eight hundred dollar note, but *that* was mere surplusage; indeed, under the ruling of the Court of Appeals, he might have described the note as a *four hundred* dollar note with perfect safety and propriety, for it has been judicially determined, that a variance of *precisely one-half* in the amount of the note and number of endorsers is, as a *legal proposition*, an immaterial variance. "But," says the court in the case of *Warden & Griswold, at the suit of the bank*, "it is contended that the notice *merely* informs the defendants of the non-payment of a note drawn and endorsed respectively by the defendants for \$300, and not of a note for \$600, endorsed by the defendants *jointly*. Concede that *such* variance or misdescription *exists*. It is well settled in accordance with good sense, that an *immaterial variance in the notice* will not vitiate it."*

It ought, perhaps, to be stated, that Judge Selden felt bound, in consequence of the decision made by the Court of Appeals in the case of *Warden & Griswold, at the suit of the Cayuga County Bank*, to rule as he did in the following case.

†††

N. Y. Supreme Court.

THOMAS BEALS *agst.* VINTON PECK, ROBERT T. LEACH and NANCY PECK,
Administrators of the estate of REYNOLD PECK, deceased, and AMON
LAMPHIRE.

STATEMENT OF THE CASE.

This action was commenced on the 15th day of January, A. D. 1850, by the service of the summons and complaint. The answer was served on the 25th day of February, 1850.

The action is upon a promissory note made by the defendant, Amon Lamphire, and purporting to be endorsed by Reynold Peck. The complaint alleges the making of the note and the endorsement of the same by Reynold Peck, in his lifetime, of which the following is a copy :

"\$800. West Bloomfield, September the 10th, 1849.
"Three months after date, for value recevd, I promise to pay
to the order of Mr. Reynold Peck, eight hundred dollars, at D. Brigh-
ham & Co. office, in the city of New-York.
(Signed) "AMON LAMPHIRE.
(Endorsed) "REYNOLD PECK."

The defendant, Lamphire, did not appear in the action, but suffered a default to be taken against him. The defendants, the administrators of Reynold Peck, put in their answer, under oath, taking issue upon the allegations in the complaint.

The action was tried at the Ontario Circuit, on the first day of June, 1850, before the Hon. Samuel L. Selden, and a verdict was rendered for the plaintiff on that day, for the sum of \$826.87, upon which a judgment was entered against the defendants, on the 27th May, 1851, from which the defendants, the administrators of Reynold Peck, appeal.

The following is a copy of the bill of exceptions :

BILL OF EXCEPTIONS.

Afterwards, to wit, at a Circuit Court, held at the Court House, in the village of Canandaigua, in and for the county of Ontario, on the 30th day of May, one thousand eight hundred and fifty, before Samuel L. Selden, Esq., the Circuit Judge appointed to hold the said Circuit, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the parties aforesaid, came on to be tried by a jury of the county of Ontario aforesaid, for that purpose duly empanelled, good and lawful men of the said county, at which day, came as well the said plaintiff as the said defendants, by their respective attorneys aforesaid ; and the jurors of the jury aforesaid, empanelled to try the said issue, being called, also came, and

Supreme Court.—Thomas Beals v. Vinton Peck and others.

were then and there, in due manner, chosen and sworn to try the same issue.

And upon the trial of that issue, the counsel for the said plaintiff to maintain and prove the said issue on his part, called as a witness,

Solon Peck, who being first duly sworn, the counsel for the said plaintiff presented to the witness the promissory note upon which this suit was brought, and the witness testified: That he was acquainted with the handwriting of Reynold Peck, and had seen him write; and that he believed the endorsement of the name of "Reynold Peck," upon the said note shown to him, to be in his handwriting.

The said note was in the words and figures following, to wit:

"\$800. West Bloomfield, September the 10th, 1849.

"Three months after date, for value recevd, I promise to pay to the order of Mr. Reynold Peck, eight hundred dollars, at D. Brigham & Co. office, in the city of New-York.

(Signed)

"AMON LAMPHIRE.

(Endorsed) "REYNOLD PECK."

The plaintiff's counsel then proved that the said note was, on the 13th day of December, 1849, duly presented by William Bloomfield, a notary public, at the place designated therein, for the payment of the same, and payment thereof demanded and refused; and that a notice of the non-payment and protest of the same had been by him, on the 14th day of December aforesaid, deposited in the Post Office, in New-York City, directed to "Reynold Peck, West Bloomfield, Ontario Co., N. Y."

The witness, *Solon Peck*, then further testified as follows: In December last, I was post-master at West Bloomfield, in this county; some time in that month, I received a communication by mail, from the plaintiff, who resides at Canandaigua, in this county, in reference to a certain note endorsed by Reynold Peck; held by him. In that communication the plaintiff enclosed to me a copy of a notice of protest, which he stated had been received by him from New-York, and also stated that there would probably be a similar notice for Reynold Peck, post-marked "New-York City;" and requested me to take it from the office, and deliver it to the administrators of Mr. Peck's estate, and get from them an acknowledgment of the notice of protest. I cannot state the day, but think it was on the 17th December. There was no Sunday mail to West Bloomfield. I think I replied to it the same day I received it.

The same day I received the communication from Mr. Beals, a letter came to the Post Office, addressed to "Reynold Peck," and post-marked "New-York." I supposed it to be the notice alluded to by the plaintiff, and I took it from the office and delivered it to Vinton Peck, in the presence of Mr. Leach, both of whom are administrators of the estate of Reynold Peck. Mr. Peck took the letter and opened it. I asked him if it was a notice of protest, and he said it was. I then showed him the notice received by me, from Mr. Beals, and he said it was similar, or the same in substance. At that time or at

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some other, I had a conversation with Vinton Peck for Mr. Beals, and asked him if they wanted the whole time to pay the note, or would pay it then. He said he should like to see it. That he had heard that Mr. Beals held a note endorsed by Reynold Peck, and that he should like to see it. No one was present but Vinton Peck. The administrators of Reynold Peck all reside at West Bloomfield, fourteen miles from Canandaigua.

On his *cross-examination*, this witness further testified: I cannot say whether the communication from Mr. Beals was dated on the 15th or 17th day of December. That communication enclosed one received by him, and stated that one similar to that, directed to Reynold Peck, would be in the mail at my office, and desired me to give it to Vinton Peck and Mr. Leach. He named them in the letter as the administrators of Reynold Peck. Very soon after Mr. Peck's death, I had a conversation with the plaintiff about the death of Reynold Peck, and I think I told him in that conversation, who the administrators of Mr. Peck's estate were. The defendants were then talked about by us as administrators of Mr. Peck's estate; their names were mentioned. This was before the note fell due. It was then I understood the note belonged to him. In a subsequent conversation, he told me the note had gone to New-York for presentation for payment. I cannot state how long it was after the appointment of administrators I had the conversation with Mr. Beals, but it was before December. The note fell due in December. Mr. Beals lives in Canandaigua. He is a banker. Mr. Peck died in Canandaigua. The Surrogate's office of Ontario county is in Canandaigua.

The notice which was delivered to Vinton Peck, was then introduced and read in evidence, and was admitted to be the only notice directed to Reynold Peck by the said notary public on protesting the note in suit; and the one which was delivered to the said Vinton Peck by Solon Peck:

"New-York, Dec. 13, 1849.

"SIR: Please to take notice, that a promissory note, made by Amon Lamphire, for \$800 ~~rs~~ dollars, endorsed by you, was this day protested for non-payment, and that the holders look to you for the payment thereof.

"Your obedient servant,

"WILLIAM BLOOMFIELD,

"Notary Public and Attorney at Law."

This notice was mailed and post-marked at "New-York, December 14th," directed on the outside to "Mr. Reynold Peck, West Bloomfield, Ontario Co., N. Y.," which is the only direction upon the notice, showing to whom the same was addressed.

The plaintiff's counsel then rested his cause, and the defendants' counsel then moved the Court, that the plaintiff be non-suited upon the following grounds:

1st. The notice of protest is defective and irregular of itself, and being so it could not be sufficient, although received by the administrators of the endorser to charge his estate.

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2d. The notice is defective, because it does not state that payment of the note was ever demanded and refused at the place appointed therein for the payment of the same. It does not describe the note in any particular, except as to the amount. It does not state when the same was dated, nor where, nor to whom payable, nor when it fell due; nor when nor where it was presented for payment, and payment refused.

3d. Because there is no evidence that all of the administrators of the estate of Reynold Peck have ever received notice of the non-payment or protest of the note, and that the notice to two of the administrators is not sufficient to charge the estate.

4th. That under the evidence in the case a notice directed to "Reynold Peck" was not sufficient, though received by the administrators of his estate. It should have been addressed to them in their representative character.

5th. The notice does not describe the note so as to convey to the mind of the endorser, or of the administrators, notice of the identity of the note, nor does it so describe it as to enable them to determine that it is the note in suit; and there is no evidence that the administrators, who received the notice in evidence, had any previous knowledge of the existence of the note in suit, or of the contents or terms of the same, from which, taken with the notice received by them, they could determine that the note in suit was the same note referred to in the notice of protest, or what note was intended to be described.*

* That is not the question. It is of no kind of consequence whether the description in the notice would or would not apply as well to any other eight hundred dollar note as to the one in suit. So far from the notary being under any obligation, as a legal proposition, to describe the note in the notice, so that the description would better apply to the note in suit than to any other eight hundred dollar note, he was under no obligation to describe the note at all in the notice; but, on the contrary thereof, he might, affirmatively, have stated that the note which he *did* protest for non-payment was a four hundred dollar note. In the case of the Cayuga County Bank against Warden & Griswold, Judge Jewitt himself says, "*the notice*" is dated Cayuga County Bank, Auburn, May 8, 1845, and states that S. Warden's note for \$300, payable at this bank, endorsed, &c., "*was*" this evening protested for non-payment, &c. There is then no question but that the notice in the above case might have stated affirmatively that Amon Lamphire's note for \$400, &c., had been protested; and yet, counsel make a point that the notice of protest would as well describe any other \$800 note as the \$800 note in suit. The only point about the matter is, whether the notice is not defective for having described the note as an \$800 note, as it was, instead of a \$400 note, as it was not. In the case of the Cayuga County Bank v. Warden & Griswold, the Supreme Court sitting in the seventh judicial district, Judge Selden being on the bench, decided that the notary was bound to describe the note in the notice as it was, and not as it was not; and that a notice which "*stated*," in the language of Judge Jewitt, that S. Warden's note "*for* \$300" &c., was protested for non-payment, *did state that*, that it *stated* what it *did state*, and did not state something different from what it *did state*; that read as it *did read*, and did not read different from what it *did read*. And that such a notice, which *did thus state* that a three hundred dollar note had been protested, *did state the fact*, and therefore it was not as a legal proposition, a certain and a correct description of a six hundred dollar note. The Supreme Court decided that the notice stated just what Judge Jewitt says it *did state*—nothing more nor less—that was all the Supreme Court *did decide*—all that it could decide—and all that it had a right to decide. That judgment was reversed. What, now, as a legal proposition, is a correct and accurate description of a note in a notice? When, as a legal question, does one paper correctly and truly describe another paper? When it states it as it is, or when it states it as it was not? What is the rule of law upon the subject? Must the notice state the note as it is, or must it state the note as it is not? Which way is the correct way, and which way incorrect; which way is the truth, and which way is false? Which way right and which way wrong?

6th. That the notice in evidence may as well be taken to describe any other eight hundred dollar note, payable at any other place or time, or dated at any other time, as the note in suit.

7th. That the note being protested upon the 13th day of December, the notice mailed at New-York upon the 14th was not sufficient. It should have been mailed on the day of the protest.

The said Judge did then and there overrule each and every of the said objections and positions so made and taken by the said defendants' counsel, and stated, that for the purposes of this trial, he should hold as matter of law and charge the jury that the notice in evidence, together with the evidence given, was sufficient to charge the administrators of the estate of Reynold Peck, in this suit.

To each and every of which decisions, so made by the said Judge, the counsel for the defendants did there and then except.

No further evidence was given upon the trial of the cause, in respect to the question of protest, or notice of the non-payment of the note in suit; but further evidence was given upon both sides, upon the issue of the genuineness of the signature of the said Reynold Peck upon the note in suit; and the said Judge holding that the plaintiff upon that question held the affirmative of the issue, the said plaintiff proceeded to call witnesses and introduce testimony as to the genuineness of the said signature; and among other witnesses to maintain the said issue on his part, the plaintiff called

Amon Lamphire, who testified, among other things, that he was the maker of the note in question, and that he saw Reynold Peck endorse the same; and that he, Lamphire, delivered the note afterwards to the plaintiff, who advanced the money upon the same.

The plaintiff then called *Anthony Yorks*, who, among other things, testified: That on or about the eleventh day of September last, he had a conversation, while at the State Fair, at Syracuse, with Reynold Peck, in regard to the amount of his (Mr. Peck's) endorsements and liabilities for Amon Lamphire. And the witness said that he had an impression, but he was not certain, that Mr. Peck, during that conversation, mentioned or referred to a note which was endorsed by him and held by Mr. Beals.

On his *cross-examination*, the witness stated that he could not recollect that Mr. Peck had so stated to him as last stated; that it was a mere impression upon his mind. The witness also testified that the note in suit had been the subject of frequent conversation between him and others at different times.

The evidence being closed, his Honor, the Judge, charged the jury that this was an action upon a promissory note, made by Amon Lamphire, and purporting to be endorsed by Reynold Peck; that the question of the sufficiency of the proof of a due protest of the note in suit, and of the notice of the non-payment of the same, so as to charge the estate of the endorser, Reynold Peck, was a question of law for the court to decide; and with that they had nothing to do. And the court did then decide and instruct the jury that the evidence of the non-payment and protest of the note and of notice thereof, which had been made by the plaintiff, was sufficient to charge the defendants, as administrators of the estate of Reynold Peck. That this

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question being disposed of by the court, there was left for the determination of the jury but one question, and that was, whether the signature of Reynold Peck, upon the note in suit, was a genuine signature or not; that on this question there was conflicting testimony, and it was for them to determine and find from all the evidence in the case, the fact, whether the note was endorsed by Reynold Peck or not.

And the Judge did also then, among other things, further charge and instruct the jury, that in considering the testimony of Anthony Yorks, who had testified in behalf of the plaintiff, and in regard to the statement made by him, that he had an impression, but was not certain, that Mr. Peck, during a conversation had between him and Mr. Peck, while at Syracuse, mentioned or referred to a note endorsed by him and held by Mr. Beals, the jury were to consider that testimony, in determining whether Mr. Peck did endorse the note in suit; for if he, at that time, admitted to the witness, Yorks, that Mr. Beals held such a note, it might be taken by the jury as some evidence that Mr. Peck had endorsed the note, because the fact testified to by the witness, that there was an impression upon his mind that such a statement was made, was some evidence of the fact that the statement was made.

To which said charge and instructions to the jury, and to each and every part thereof, as well to the instructions to the jury that the evidence of the protest, and notice of the non-payment of the said note was sufficient to charge the said defendants, the administrators of the said Reynold Peck, as also the instructions to the jury in regard to the evidence of said witness, Yorks, and every part thereof, the counsel for the said defendants did then and there except.

And the counsel for the defendants did then and there request the Judge to charge the jury that the evidence given of the protest of the said note, and notice of non-payment of the same, was insufficient to charge the said defendants, the administrators of the said Reynold Peck, upon the several grounds stated by the defendants' counsel, on the motion for a non-suit of the plaintiff. The said Judge did then and there refuse so to charge as requested by the defendants' counsel, to which said refusal the counsel for said defendants did then and there except.

The counsel for the defendants did also request the said Judge to charge and instruct the jury that in regard to the testimony of the witness, Yorks, the mere fact that he had an impression on his mind, but was not certain, that Reynold Peck had, during the conversation between him and Mr. Peck, at Syracuse, mentioned or referred to a note held by Mr. Beals, endorsed by him, was not sufficient to authorize the jury to infer that such a statement was made by Mr. Peck. The said Judge did also then and there refuse to charge and instruct the jury as last requested, to which decision and refusal the counsel for the defendants did then and there except.

The jury retired under the said charge of the said Judge, and afterwards came into court and rendered their verdict, by which they found for the said plaintiff the sum of eight hundred and twenty-six dollars and eighty-seven cents.

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And inasmuch as the said several matters so produced and given in evidence, and so as aforesaid objected and excepted to, do not appear by the record of the verdict aforesaid, the said counsel for the said defendants did then and there propose the aforesaid exceptions to the opinions, decisions, and charge of the said Judge, and his refusal to charge as aforesaid, and then and there requested him to put his seal to this bill of exceptions, containing the several matters so produced and given in evidence, and objected to, insisted upon, and overruled as aforesaid by the said Judge, and to his charge, according to the form of the statute in such case made and provided. And thereupon, the said Judge, at the request of the said counsel for the said defendants, did put his seal to this bill of exceptions, pursuant to the statute in such case made and provided, this first day of June, one thousand eight hundred and fifty.

SAMUEL L. SELDEN. [SEAL.]

H. S. District Court.

[*Southern District of New-York.*]

Before the Hon. SAMUEL R. BETTS, District Judge.

[*In Admiralty.*]

JOHN H. JONES AND OTHERS v. THE SCHOONER HANOVER, WM. C. THOMPSON AND OTHERS, *Claimants*. WM. C. THOMPSON AND OTHERS v. JOHN H. JONES AND OTHERS.

CROSS LIBELS FOR COLLISION AT SEA, &c.

By the settled law of navigation, applicable to vessels, the one close hauled and the other free, sailing during daylight or a clear night, the free is bound to get out of the way of the close hauled, by taking proper measures of precaution in time.

During thick and foggy weather, the law exacts from each vessel the greatest care and vigilance to avoid collision, which, if observed, and a collision, notwithstanding, takes place, it is regarded as an inevitable accident.

During thick darkness, mist or fog, the Admiralty Courts have noticed various precautions as proper to be observed by those navigating under these circumstances—such as carrying lights, keeping a good look-out, regulating the speed, notices by fog-horns, bells, and other means, to indicate their respective positions.

No positive law has yet settled that vessels generally are bound to carry lights in the night when sailing; nor have the American Courts of Admiralty recognized any explicit rule as obligatory in such cases.

Held, That no custom was proved of carrying a permanent light at night, while under sail at sea, or in the coasting trade.

The general bearing of testimony indicates that vessels are more misled than aided by a single stationary light on another vessel under sail.

Held, That under the circumstances of vessels sailing during a thick fog, a light should have been within reach of the look-out, to have been exposed, or waved, to give notice to the other vessel of their position, and the omission was blameable.

Held, That in the present case, a suit "*in rem*" being pending, there was no necessity for a cross suit "*in personam*" until a decision of the previous suit. Libel *in personam* dismissed with costs.

Held, That vessels sailing during a dense fog are bound to have on deck all the disposable part of their crew, to aid in keeping a look-out.

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Held, To have been a want of vigilance on board of both vessels to trust the look-out to one man.

Held, Under the circumstances, that the master and crew of the vessel lost were justified in abandoning her, and staying on board the other vessel; and, therefore, that their so doing did not culpably contribute towards her loss.

Held, That owners of cargo must be made parties to the suit before they can avail themselves of the operation of the decree.

The circumstances of this case sufficiently appear in the opinion of the court.

F. B. Cutting, C. B. Moore and W. Q. Morton, for the *Amelia*.

D. Lord, Jr., B. F. and W. S. Butler, for the *Hanover*.

BETTS, Dist. J.—These two actions are founded upon a collision at sea, between the schooners *Amelia* and *Hanover*. Each party charges the other with being the blameable cause of the disaster, and claims compensation for the damages resulting from it.

The two vessels came together in a thick fog, early in the evening of January 18, 1850, a few miles south-easterly from Hog Island, off the eastern coast of Virginia, and about 20 miles from Cape Henry.

The *Amelia* left Hampton Roads for New-York at noon the same day, laden with flour, grain, &c. The *Hanover* was light, on her return voyage from New-York to Richmond, with passengers, &c.

The pleadings in neither action state the course of the wind, nor the direction either vessel was taking at the time of the collision; but it appears upon the proofs, that the wind was about N. N. W., and that the *Amelia* was steering nearly N. E. by N., close hauled, and the *Hanover* heading nearly S. S. W., four or five points off the wind, which would bring them approximating to the same line, running in opposing directions, although it is contended by each party that their vessel was some points to the windward of the other.

Had the vessels met in that manner in daylight, or a clear night, they were approaching each other so directly that the familiar law of navigation would apply, and the *Hanover*, as sailing with the wind, would have been bound to give way, the obligation being imposed on the vessel having the wind free of taking proper measures to get out of the way of a vessel which is close hauled. (Story Bail, § 611; Angell on Carriers, § 651; Abbott, 234, margin and notes.) If two vessels come together in thick and foggy weather, when all reasonable precautions have been taken on board of both, the collision is regarded an inevitable accident, and neither is liable to the other for the consequences. (2 Wm. Rob., 236, *The Itinerant*.) But the law is strict in exacting from each the observance of the greatest care and vigilance under such circumstances, to avoid the danger of collisions.

Various particulars have been adverted to by the courts, as marking the exercise or omission of proper prudence in navigating in thick darkness, mist or fog.

These relate to *carrying lights*, to keeping a *sufficient look-out*, to the speed of movement, and to notices attempted to be given by *fog-*

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horns, bells, or other means tending to indicate the presence and position of the vessel, and afford a warning to others approaching.

No positive law has yet settled that sailing vessels are bound to carry lights in the night time, when under way.

The point has been frequently before the English Court of Admiralty. (2 W. Rob., 1, *The Rose*; *ibid*, 382, *The Iron Duke*.) The Trinity Masters declared their opinion, that under ordinary circumstances, sailing vessels do not show a light, and are not required to do so. (2 Wm. Rob., 385.) But one at anchor, in a track frequented by other vessels, is bound at night to show an efficient light. (3 Wm. Rob., 49, *The Victoria*; Abbott, 232, *Hay v. Le Neuve*.)

The American courts have repeatedly adverted to the subject, without laying down any explicit rule to be regarded as obligatory on vessels under way. (17 Mss. Decisions, 15, *The Falcon*.) But when at anchor in a harbor, (Angell on Carriers, § 647, 649; Davies Ad. R., 359, *The Scioto*; 13 vol. Mss., 53, *The Indiana*; 2 Legal Obs., 67, *The North America*), or lights are required by statute to be exhibited, (8 Law Rep., 275; 5 How., 441, *Waring v. Clark*.) the courts are rigid in exacting an observance of the requirements.

So, also, when a vessel is discovered approaching, and apparently not observing the one she advances upon, the latter, on descrying her, if in the night, should exhibit or wave a light, as a warning to her. (5 N. Y. Legal Obs., 293, *The Neptune*; 6 *ibid*, 198, *The Bay State*; 3 Wm. Rob., 75, *The Birkenhead*.) These comprise the points considered in the reported American cases.

I do not, therefore, think the law imposed on the *Amelia* the obligation of carrying a light on the occasion, nor is it proved that a custom is established in the coasting trade, in which she was engaged, for vessels in her situation to carry lights. The practice obtains with many masters to do so, yet, the methods they adopt, according to the evidence, vary with the notions of each individual, and a habit of hanging or placing a light somewhere on or above deck, however useful it may prove in particular instances, cannot be regarded as amounting to a custom which sailing vessels must observe, or an usage of such notoriety that vessels at sea will regulate themselves in expectation of its being done by others.

The utility of lights on steamers, usually vessels high out of water, and which hold a steady course, and are not so much encumbered with sails, so that they can give the lights a conspicuous position, is far different from what it may be supposed to be with ships, and particularly small vessels, lying low in the water, which, from the necessity of veering about with the changes of wind, can afford no certain indication by the light, whether their course will interfere with that of the other or not.*

* "MARINE AFFAIRS—NOTICE TO MARINERS."

"The subjoined instructions are forwarded from the U. S. Navy Department.

"That all U. S. steamers will carry the following lights when at sea during the night.

"A white light at the mast-head; a green light on the starboard paddle-box, and a red light on the port paddle-box.

"It is believed that the general use of these signals would prevent many disasters.

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Accordingly, the vessel approached can have no sure indication of the course of another exhibiting a single light until she is near enough to discover her hull or sails, nor indeed can it be known but that she is at anchor.

As the custom is notorious to show a light when a vessel is at anchor, the general bearing of the testimony in this court upon the subject for several years has been, that sailing vessels are more misled than aided by a single stationary light on another sailing vessel under way. A lamp, or brand of fire waved to and fro, is a significant signal that the vessels are closely approximating, and it is a fault to omit giving such signal, when one vessel has time to do it, or for the other not to heed it when given.

In the present case, I do not think the testimony fixes any blame on the *Amelia* for not carrying a light, or shows the one on the *Hanover* was any advantage to her.

Was anything omitted on the *Amelia* after the *Hanover's* light was descried, proper to be done, or anything wrong done, which tended to produce the collision?

These enquiries can only be solved by the testimony furnished from the *Amelia*, and the consideration of the relative positions of the two vessels, because nothing was known of her on the *Hanover* until the instant of collision. Kearney, the man on the weather bow of the *Amelia*, testifies that he was on the look-out. He saw a light right forward, and a little to the windward of the *Amelia*. He called to the mate at the helm to know if he saw it, and was answered he did not. Then called a second time, and ordered him to port the helm as hard up as he could—gave the order quick, “up and hard up.” As the vessels were striking, he heard an order from the *Hanover* to *put up the helm*, but could not tell whether it was given to that vessel or the *Amelia*.

Captain Mott was below, and heard the call of Kearney and a reply by the mate, and went immediately on deck and jumped on the trunk. Then saw a light two or three points on the weather beam of the *Amelia*. He ordered the wheel hard up—the mate answered, it was *hard up*. He supposed the light was set on the jib boom of the *Hanover*; if he had thought it aft, he should have ordered his helm down. The light was then pretty much on his beam. He did not make out the sails of the *Hanover* until after he saw the light, and then she was about her length off, as near as he could judge. He heard no hail from the *Hanover* to his vessel; but some one on the *Hanover* sung out, “which way is she going?” He did not understand it addressed to his vessel.

Captain Lampkin, of the *Hanover*, testified he was keeping the look-out on his vessel, and was the first to see the *Amelia*, then right under his lee bow, the jib boom of the *Hanover* in the act of passing in between the fore mast and mizen mast of the *Amelia*. He could

“Notice is given that the following steamers are fitted according to the above instructions:”
(The names of forty steamers on the Atlantic and Pacific oceans are enumerated in the original instructions.)

“New-York, January, 1851.”

“WM. SKIDDY, Navy Constructor.”

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not see more than fifty or sixty feet off on account of the dense fog ; and he called out to her to put her *helm a port*—that is up.

It is to be remarked, that the Hanover was a large schooner, was light, and high out of water ; the Amelia, a small vessel, deeply laden, and lying low in the water. At the time the two masters discovered the proximity of the vessels, it was palpably out of the power of either to do anything which would have prevented the collision. It must have followed instantaneously.

Nor does it appear to me any movement of the Amelia could have avoided it, after the light of the Hanover was descried. No reliance can be placed on an estimate of time by witnesses under such circumstances ; but the acts which followed, demonstrate that the vessels were at the moment directly upon each other. Kearney cried out to the mate, giving notice of the light, and then, as quick as he could, called again to put his helm hard up. Captain Mott heard the cry, and sprang on deck. He was lying on the floor of his cabin, and the outlet was close by the helm, and when he got there the Hanover was only her length from him ; and Captain Lampkin says he also cried out to the Amelia to port her helm.

It is possible a notice from the Amelia, such as to apprise the Hanover of her situation when the light was first seen by Kearney, might have enabled the latter vessel to luff out of the way of the Amelia ; although no great confidence can be placed upon a mere conjecture of the kind, for Kearney says, as does also Captain Lampkin, of the Hanover, that they could not perceive the Amelia obeyed her helm so as to fall off any, and Captain Mott only infers she might have fallen off two or three points ; yet a proper precaution ought to have placed at hand some means on the Amelia, by which an effort to warn the Hanover of her position might have been made. A lantern might have been kept within the ready reach of the lookout, which he could have waved on the forward part of his vessel, affording some chance for the other vessel to see it, and be benefitted by it. But what would have been far more serviceable, he should have been prepared to give signal by some noise calculated to reach the approaching vessel when she was first descried. These particulars are the only omissions chargeable upon the Amelia, and in my opinion, upon the evidence, from the thickness of the fog and the nature of that darkness, a warning by some appropriate noise would have been the only one which could have benefitted the Amelia.

If there was a blameable omission in this respect on her part, it attaches equally to the Hanover, and the owner of the latter vessel cannot charge upon the owner of the former the entire loss occasioned by a fault in which both participated alike.

There accordingly seems to me no legal grounds established upon which the action *in personam* by the owners of the Hanover against the owners of the Amelia can be sustained. At most, the case would only justify a division of the damages between the parties ; but as, upon the evidence, the loss fell almost exclusively upon the respondents, a judgment in this form of action could not be rendered in their favor against the libellants, for the excess of damages

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payable to them after those sustained by the libellants were satisfied, and they would be driven to a cross-action for their remedy.

There was no necessity for the suit until a decision was obtained upon the action previously instituted against the Hanover.

On the 16th of February, 1850, a libel was filed, and a warrant taken out against the Hanover, and she was arrested thereon the same day.

On the 27th of February the libel was filed *in personam* against the owners of the Amelia, so that the suit *in rem* was already in prosecution, in which would appropriately be adjusted a division of damages, if one should be decreed by the court because of mutual delinquency, or a fault somewhere, inscrutable in its character.

As the owners of the Hanover fail to establish a right to recover against the owners of the Amelia, independent of a counter responsibility to the latter, and that liability, if regarded only as a right of set-off, will greatly overbalance the demand of the libellants, the libel *in personam* must be dismissed with costs.

It may be proper to notice, that an act of Congress, passed the present session, limits the liability of owners of vessels for damages by collision to the value of their interest in the vessel and freight at the time the wrong was committed. (9 Stat. at Large, 635, § 3.)

Under similar provisions of a British statute, the Court of Admiralty in England holds, that in case of the total loss of the colliding vessel in consequence of the collision, no action can be maintained against the owners for damages. (3 Wm. Rob., 41, *The Seringapatam*.) This is founded upon an alleged exposition of the statute by the Court of Exchequer, but the case is not quoted.

Without professing myself satisfied with the principle adopted by the English courts, I think here the clear equity is with the respondents, and the decree must be in their favor for costs.

The two cases have been submitted to the decision of the court, upon the same proofs and arguments. The decision in one case in effect must determine the controlling points in the other; yet the suit *in rem* against the Hanover brings more directly under consideration all the particulars of the occurrence, and properly requires a more minute examination of the movements of the two vessels than has been given in the personal action.

It is assumed in that decision, that the two vessels were moving in opposite directions on the same line; that seems to be the reasonable bearing of the evidence taken together, although no positive exactness can be attained on this particular. The course of the wind, and the courses the two vessels were steering, are given upon estimates, neither being ascertained by the compass. The wind was about N. N. W. The Hanover was bearing about S. S. W., and the Amelia about N. E. by N., the sails of each vessel being kept full, the Amelia close hauled about five points on the wind, and the Hanover four or five points free.

The testimony does not enable the court to fix these positions with certainty, yet the variations of a point or two either way from these precise courses, would still leave the vessels so directly approaching, that, in the day time, the Amelia would have the privilege of hold-

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ing her course, and the Hanover would be bound to give way. (Westminster Review, Sept., 1844, p. 63, 3 Kent, 6th ed.; 230 Abbott, 234.)

It is otherwise when the wind is equally favorable to each, for then both must go off to the right, (Angell, § 652; Story Bail, § 611,) and if it be doubtful as to that, or of the precise course of the approaching vessel, the one on the larboard tack, particularly in the night, must give way in due time, (Angell, § 654,) without regard to the fact, that she may be a point or two most to the windward. (2 W. Rob., 197, *The Franklin*; ibid, 195, *The Mary and Ann*.)

The *Amelia*, in the darkness of the night, and the glimmering of light apparently directly ahead, was justified in acting upon the supposition that the vessels were so situated in relation to each other, that it was the duty of both to give way, so as to pass to larboard.

But she was very likely mistaken in the supposition, as from the manner the blow was given, it is most probable the Hanover was, in fact, rather to leeward instead of in a right line with, or to the windward of the *Amelia*. Several circumstances tend to prove this:—*First*, The light which was seen dead ahead was on the starboard side of the Hanover, and aft of midships. Had the *Amelia* been to the leeward, the sails of the Hanover would have interfered with, if not intercepted, a direct view of the light, or brought it to bear off her larboard bow. In the second place, it is reasonable to infer that the action of the *Amelia's* helm, when put hard down, had some effect upon her, she being under good headway, with a strong breeze, and that she had, as conjectured by her master, fallen off some points by her head, and perhaps sufficiently to move her out of the track of the Hanover, had the latter been, when described, dead ahead: and in the third place, the blow was given so far aft on the *Amelia* as to indicate that she was then standing more at right angles with the direction of the Hanover, than she would naturally be, had the latter been directly ahead, and is not readily reconcilable with the notion the *Amelia* was to windward. These presumptions, however, if well founded, in no degree vary the relative rights and duties of the two vessels.

The movement of the *Amelia* was in thick darkness and at random, to rescue herself from a danger impending instantly over her; and whether, in the extremity, she went to the right or left, could not be imputed as a fault to her.

To render her chargeable for a wrong movement thus made, there must have been some delinquency on her part in the circumstances bringing her into that situation. Nor, indeed, do these hypotheses supply any conclusion very satisfactory to the judgment, for any inadvertent bearing up of the Hanover when there was no special effort to hold her to a fixed line, or any accidental irregularity in her steerage, might fully account for her being in a situation to give such a blow as received by the *Amelia*, whether when first described she had been running on the same line with her, or a point or two to leeward or windward; and it is to be remarked, there is no proof that there was any particular effort to keep her steady to a fixed course by the compass.

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Both vessels were guilty of two marked faults, but neither more so than the other.

It was the duty of both to have had on deck all the disposable part of their crews to aid in keeping a watch during the continuance of the dense fog. This fog had come on suddenly, and it was well understood by those familiar with the navigation and climate in that region, that, under the existing state of the wind, the obscurity would be but temporary. In fact, it was removed within a few minutes after the collision and before the vessels could be separated.

Admitting that a careful look-out was kept by one man on each vessel, it was inadequate, and not what the exigencies of the case demanded.

This point is frequently brought up in the decisions of the English Admiralty, and it seems to be insisted on as want of vigilance, if not a mark of positive fault, to trust the watch, under such circumstances, to a single look-out. In one of the latest cases, it was observed by the court, when the master went below to examine his chart, leaving a single man on the look-out, that it is no excuse to urge that from the intensity of the darkness, no vigilance, however great, could have enabled one vessel to descry the other in time to avoid the collision.

In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed, and if the master found it necessary to go below, he was bound to have called up another of the crew to supply his place on deck. (3 Wm. Rob., 7, *The Mellona*.) Similar doctrine is declared in other cases. (2 W. Rob., 201, 206, 234.)

The precaution, incumbent on both vessels to use in such extremity of weather, was alike omitted by each, that of giving notice of their situation by sounding fog horns, ringing bells, or employing other signals of like efficacy.

Dr. Lushington has in repeated instances marked this as a duty of the most urgent character, with vessels embedded in deep fogs, or mist, or thick darkness. (2 Wm. Rob., 237; *The Itinerant*, *ibid*, 201; *The Virgil*, *ibid*, 206; *The Ebenezer*, *The Europa*, (1850,) 14 Jurist, 627.)

The practice has been likewise recognized in this court, as one demanding the observance of vessels so situated, (6 N. Y. Legal Obs., 198, *The Bay State*).

Both vessels were guilty of a common fault in these two particulars, which, if the libellants have not shown misconduct and negligence on the part of the Hanover in other respects conducing to the disaster, will call for the decree apportioning the loss between them, because one vessel, by her own improvident or improper conduct, placing herself in a situation to receive damages from another acting with like improvidence and impropriety, but without any culpable purpose, cannot impose on the latter the entire loss incurred, (Story on Bail, § 608, 610). It is different at law, as a party cannot then, when himself in whole or in part the blameable cause of the injury he has sustained, claim compensation for the injury his own fault

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has tended to produce. (3 East R., 18. *Kent vs. Elstop*; 3 Kent, 231, Note 6.)

It is charged against the *Hanover*, that she was running under too heavy a press of sail and at a dangerous speed, and that at the time the two vessels came within sight of each other, she had no look-out stationed forward.

The *Hanover* was in ballast, and had her main-sail, foresail, main-top-sail, jib and flying-jib all set. She had a beam br leading wind, steady at about N. W.

This is so stated by Capt. Lampkin. Capt. Mott, of the *Amelia*, makes the wind N. N. W. She was making 7 1-2 to 8 knots the hour. The *Amelia* had no square sails, but was running close hauled with all her sails set, and making about 6 knots the hour. The sea was pretty rough.

The speed of the vessels is of course given upon conjecture, but supposing the estimates approximate the actual speed, the difference is too small between them to render the act of maintaining it essentially more culpable in one than the other.

The doctrine of reason as well as of the law, in regard to vessels running in intense darkness is, that those of all descriptions should so check or restrain their velocity that their movements may be reasonably under command of their crews, and so that the effect of a collision, if one occurs, may be prevented becoming fatal to either. (2 W. Rob., 377, *The Iron Duke*; 2 W. Rob., 1, *The Rose*; 14 Jurist, 627, *The Europa*; 6 N. Y. Legal Obs., 198, *The Bay State*; 5 N. Y. Legal Obs., 293, *The Neptune*; vol. 10, Mss. Decisions, 31, 34.) The *Virgil* was condemned in damages and costs for running down another vessel, because going before the wind in a hazy, dark night at the rate of eight or nine knots the hour. The Trinity Masters reported she was faulty in not being put under easier sail. (2 Wm. Rob., 201.)

In the succeeding case of the *Ebenezer*, the same court, however, held it not to be ground for condemnation, that she was running in thick weather and a dark night with full sail, when no other circumstance of fault was found against her, and it might be a reasonable precaution against vessels following her to keep on all sail. (2 Wm. Rob., 206.)

I am not disposed to pronounce the *Hanover* guilty of any negligence or want of precaution in this respect, on the occasion, seeing she was as liable to be followed by vessels on the same course, as to meet those going in an opposite direction, and that, probably, both vessels, with a view to these considerations, were going at nearly an equal rate of speed. Nor do I think either vessel was bound to come to anchor, although on soundings, because both were, in effect, on the high seas, and it is proved by Capt. Dearborn, that anchoring at that place, in the state of the weather, would be highly hazardous. Nor does it appear to me that the cause turns upon the question of proper or improper speed of the vessels at the time, or that the extreme darkness imposed more responsibility on one than the other. (*The Birkenhead*, 3 Wm. Rob., 75.)

It is attempted to be shown against the *Hanover*, by a critical

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analysis of the proofs, and the attendant circumstances, that there was not, at the time when she was descried by the *Amelia*, (and the collision became inevitable,) any look-out stationed forward upon her. Captain Lampkin swears positively to the fact, that he had himself the station of look-out forward, and so placed himself, that as far as his vision could extend, he had a view off each bow of his vessel, and that he was at that post keeping a careful look-out twenty or thirty minutes previous to the collision. He did not see the *Amelia* until the bowsprit of the *Hanover* passed over her side.

It is argued with great earnestness that he had neglected his duty of look-out in going aft to examine the soundings of the lead, and that the depositions of Waldin, the man at the helm, and of Wilson, the one heaving the lead, import that the master was about the deck elsewhere than forward keeping a look-out at the moment the *Amelia* was descried.

On a most careful consideration of all that evidence, I do not find anything in it in contradiction to, or necessarily inconsistent with the statement of Captain Lampkin. Nor is he any other way contradicted in this respect than by the seeming improbability, that keeping a careful watch he could run upon the *Amelia*, without seeing her until within the length of his bowsprit from her hull.

Whether he was capable of seeing her or not, must depend upon the denseness of the mist and fog. It may present a reason for greater caution in examining and receiving the representations of Captain Lampkin as strictly true, that the body of the *Hanover* was seen from the *Amelia* at a greater distance than that. Still, it must be borne in mind, that the *Hanover* was much the largest vessel, stood highest out of the water, and presented a broader view of her sails to the *Amelia*, if they approached in a direct line; and, also, that the attention of those on board the *Amelia* was fixed upon the point where she appeared by the light previously discerned in that direction.

I cannot, therefore, regard those circumstances as discrediting the testimony of Captain Lampkin, and whilst I pronounce both vessels grossly culpable in running in such thick darkness in a route known to be a great thoroughfare for coasters, with only a single look-out stationed forward, I must hold the blame incurred by them alike, and can see no reason for charging upon the *Hanover* the whole responsibility for the neglect. It is impossible to assert, that if both crews had been employed in keeping the most vigilant watch, the approach of the two vessels could have been discovered sooner than they were, in fact; nevertheless, the law imposes on them the necessity of using the utmost precaution, adapted to the nature of the hazard, and within their ability to employ. That of maintaining a full and attentive look-out, is always signaled as one most urgent, and generally found to be most beneficial. (2 W. Rob. 201, 206, 234; 3 Wm. Rob. 7, 17; Mss. Decisions, 15, *The Falcon*.)

I do not, on a careful view of all the evidence, regard the collision as an unavoidable accident, in which neither vessel should be answerable to the other for the consequences. (2 Hagg., 154.) On the contrary, I think the case is resolved into one of mutual neglect and

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inattention in these vessels, and that the losses they have incurred in consequence, must be apportioned between them. This rule of dividing a common loss between the parties occasioning it, or *judicium rusticum*, as sometimes termed, is peculiar to this class of cases, and obtains only in maritime courts. Chancellor Kent regards it one of equity and expediency, when both parties are to blame, and where the controlling fault cannot be detected. (3 Kent, 231.)

After the collision had occurred, it was the duty of all on board both vessels to do everything within their power to rescue each other from the calamity, and lessen to the greatest extent possible the injurious consequences, and neither is responsible to the other for losses which might, by reasonable exertions, have been avoided or diminished by those sustaining them.

It is imputed to the master of the *Amelia*, that he abandoned his vessel without justifiable cause, and without any of the efforts a prudent and resolute man would have made to save her.

The testimony of the Captain of the *Hanover* is very pointed and strong to that effect. His representations are to be received with great caution in this respect, for whatever may be his integrity of character, there must be an influence creating the strongest bias on his mind, to exhibit his own conduct in a proper light, and cast on the suffering vessel and her crew the burthen of blame, if any, leading to the catastrophe.

He accordingly charges on Captain Mott gross inattention to, and neglect of his vessel, when proper efforts, within his means to employ, might have saved her.

Immediately after the concussion, Captain Mott and his two men jumped on board the *Hanover*. They stepped back twice to the *Amelia* whilst the vessels continued fastened together, remaining but a minute or two, and making no effort to save their own effects. All they did was to attempt to lower their own boat, to have it in readiness, and to extricate the vessels from each other, first by lowering, and then immediately hoisting some of the forward sails of the *Amelia*.

One of the davits upon which her boat hung was carried away by the *Hanover*, thus letting down one end of the boat into the water, causing it to fill immediately, and rendering it useless for the service of the crew.

Captain Lampkin says he directed Captain Mott to anchor his vessel, and offered his boat for his use, and also two of his own crew to go on board the *Amelia*, and two of the men testify they offered, and were willing to go in her.

These statements must be received with some allowance, if not distrust. Captain Mott denies he had any directions or advice from Capt. Lampkin to anchor the *Amelia*, and the inquiry will naturally arise, why, if Captain Lampkin did not think her seriously injured, he should require her to be anchored more than the *Hanover*?

It would not be a very obvious or promising measure to take in the predicament of the vessels. The wind and sea were high, the night very dark, and as yet, it was unascertained what might be the character and extent of the injury either vessel had received.

Captain Dearborn proves that the place was an open roadstead-

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and unsafe for the anchorage of small vessels. It is scarcely credible, therefore, that while the vessels were thumping violently together, and the danger to both becoming instantly more imminent, that any advice should have been given to bring the *Amelia* to anchor, with a view to her safety.

The probability is also strongly against any offer then being made to lend the boat of the *Hanover* to the *Amelia*, or to place part of her crew on board the latter.

Captain Lampkin, in answer to enquiries, why he did not see to having the anchor of the *Amelia* thrown over, if he deemed it so important, excuses any personal attention to the matter, because his anxiety and exertions were all required by his own vessel, as he felt it of extreme necessity to clear her immediately of her then situation. What use, besides, for her boat, whilst the two vessels remained entangled and beating violently together, and why would it be offered the *Amelia* in that situation?

The acts on board the *Hanover* show that all the efforts of the crew were called forth for her rescue and preservation. The main stays, or shrouds, of the *Amelia* were cut away by the crew of the *Hanover*, and it was manifestly considered everything respecting her must be disregarded or sacrificed to aid in saving the *Hanover*.

After the vessels separated, there would seem to be no object in offering the boat of the *Hanover*, or men from her, because the *Amelia* filled off instantly with her sails on the wind, and was out of sight in a few minutes. No fact is in evidence to show she could have been successfully pursued and overtaken, had the boat of the *Hanover* been despatched for the purpose, nor is it proved that any body on board the latter believed it could have been done.

If, then, an offer, such as is stated, was made, all the facts conduce to show it was after the vessels had separated, and when no serviceable end could be expected to be answered by it.

In my opinion, the circumstances well justified the master and crew of the *Amelia* abandoning her, and seeking the preservation of their lives in the *Hanover*.

The shock of the two vessels, in striking, had knocked the mate of the *Amelia* overboard, and he was drowned. The wound received by her was near mid-ship; the slight examination made indicated it to be a fatal one, both from its place and extent. She was a small craft, deeply laden, lying low in the water. The *Hanover* was driving stem on her, by force of the wind and sea, and each moment perilling her instant destruction.

When cast loose, her main shrouds were severed; the night was dark, the sea rough, and no port she could hope to make with security short of twenty miles distance.

For the master and two men, or even four, to have attempted her navigation under these circumstances, would have been flagrant rashness, particularly without a boat in which they might have a chance for their lives. It is not to be inferred or credited that the *Hanover*, until her own condition was fully known, would have allowed the *Amelia* to take away her boat, leaving no means of escape, if one became necessary, for her own crew and the twelve passengers she had on board.

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The propriety of the course adopted by the captain of the *Amelia*, is not to be determined by the aspect of things as now presented to us, nor by the impressions of Captain Lampkin at the time, but according to the natural language of the circumstances then in view of Captain Mott.

He was bound to devote himself with energy and courage to the preservation of his ship, but there was no obligation on him to peril his own, and the lives of his crew, in an undertaking desperate, or imminently perilous in its character, when other means of safety were at hand, and he ought not to be controlled in his decision, nor its justness be measured, by the opinion of those whose interests were all on the side of his encountering the hazard.

By the testimony of Captain Mott and Kearney, who examined the break made in the side of the *Amelia*, as far as the condition of things at the moment permitted, there was probable reason to believe she would sink instantly on being disengaged from the *Hanover*.

It is to be accepted on the evidence, that she perished from that cause, although she was seen under way fifteen minutes after she was cut clear from the *Hanover*. She was shortly afterwards fallen in with, capsized and mostly under water, and soon afterwards was seen stranded on the coast, near Norfolk; it would, therefore, be easy for the claimants, who reside there or at Richmond, to prove the state of her bottom, and show that no such injury had been inflicted there as must necessarily have caused her destruction.

In my judgment, the master and crew were justified in abandoning her, and her total loss must be attributed to the injury received from the collision with the *Hanover*.

Many particulars in the extended detail of proofs have been urged by counsel with much earnestness as tending to discredit Captain Mott and Kearney on one side, and Captain Lampkin on the other. I do not discuss those topics, or pronounce any opinion on the bearing or effect of those particulars, because, to my mind, the essential facts upon which the decision is rendered, stand unquestioned before the court.

I shall, accordingly, order a reference to ascertain the total loss sustained by each vessel, and that there be decreed an equal apportionment of the whole losses between them.

The libellants sue as owners of the schooner, her equipments and freight, and claim recompense for a total loss of those, and also claim the right as bailees of the cargo, to recover the value of the cargo in behalf of all persons interested in it, who shall contribute to the expenses of this suit.

There are no papers presented on the hearing to show that the owners of the cargo have made themselves parties to this action so as to be concluded by its decision.

If they do not connect themselves properly with the cause, so as to have their rights determined with it, their interests will not be taken into account on the reference before the commissioners.

Order accordingly.

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N. Y. Supreme Court.

[*Seventh Judicial District—June General Term, 1851.*]

Before WELLES, TAYLOR and JOHNSON, Justices.

THE PEOPLE ON THE RELATION OF EZEKIEL WILLIAMS v. JOHN P. HULBERT, COUNTY JUDGE OF CAYUGA COUNTY.

COMMON LAW WRIT OF CERTIORARI.

Fears expressed that great, if not insurmountable difficulties will be experienced in attempting to make the provisions of the code, relating to proceedings supplementary to the execution, "available before County Judges and Justices of the Supreme Court at Chambers." The ignorance and absurdity which have of late characterized the Legislation of the State, commented upon.

The facts will sufficiently appear in the opinion of the court.

Warren T. Worden, for Relator.

John Porter, for Respondent.

By the Court.—JOHNSON, J.—This was a proceeding supplementary to the execution upon a judgment in favor of Friend Humphrey and Robert Thompson against the relator, before the County Judge of Cayuga County, under § 292 of the Code.

The affidavit, upon which the judge issued his order, set out, amongst other things, that the attorney of the plaintiffs, on the 27th of May, 1850, "issued to the sheriff of Cayuga County, an execution upon the said judgment, which was delivered to the said sheriff on the 28th day of said month of May." It further states, that the defendant in the judgment was then a resident of said county, and that the sheriff called upon him and exhibited the execution, and that the "defendant informed the said sheriff in substance that he "had nothing upon which he could levy the execution." It is objected on the part of the relator, that enough does not appear upon the face of the affidavits to give the County Judge jurisdiction to issue the order. No authority is given to the party to apply for this order, or to the judge to issue it, until after an execution has been issued against the property of the defendant. Three kinds of executions are provided for by the code—one against the property of the debtor, another against his person, and a third for the delivery of the possession of real or personal property. The affidavits presented to the judge, do not show what kind of an execution was issued upon this judgment. If we were at liberty to indulge in presumptions in such a case, it might perhaps be inferred from what took place between the sheriff and the defendant in the execution, when the latter was called upon and the execution exhibited, that it was an execution against his property. But this will not do where the jurisdic-

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tion of an inferior officer, to act in the first instance, is drawn in question. In all such cases, the facts upon which jurisdiction rests must be shown affirmatively, and are not to be deduced by inference or presumption. Nothing is to be presumed in favor of the jurisdiction of inferior officers and tribunals. This is too well settled, in this state at least, to require illustration or the citation of authorities in its support.

The affidavits here do not even disclose the nature of the claim on which the judgment was founded. But if they did, he would not even presume that the party issued the proper execution. The fact is to be established by a direct and affirmative allegation, in order to give jurisdiction to the inferior officer. I think it is clear, therefore, that the County Judge, in this instance, acquired no jurisdiction to issue the order and proceed to the examination upon these affidavits.

The claim which the judgment creditors sought to have applied in satisfaction of their judgment, was one which they alleged existed in favor of the relator against two firms in Auburn, for services rendered by him in their employ, and which they claimed Mrs. Watson, a daughter of the relator, had become liable to pay to him. They sought to charge Mrs. Watson with the demand, and not the firms, and to obtain satisfaction from her. Both she and the relator denied the existence of any such demand or liability against her. The judge proceeded, nevertheless, to try this disputed question of fact, and examined the relator, Mrs. Watson and other witnesses, and various documents and papers, as to the nature and origin of the claim and its alleged payment, and thereupon, as appears from his order or decree, "adjudged and decided," that Mrs. Watson was the debtor of the relator, and that the amount of such indebtedness remaining unpaid should be applied in satisfaction of the judgment.

All this part of the proceeding was wholly unauthorized and void. The judge had no right whatever to try this disputed claim in this way, or to make any determination of any kind in regard to it. By § 299 of the code, if the person alleged to be indebted to the judgment debtor denies the debt, the judge is authorised by an order to forbid a transfer or other disposition of it till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution. This section expressly provides that such interest or debt shall be recoverable only in an action by the receiver. If the application of property, which the judge is authorised to order by § 297, was intended to extend to debts due the judgment debtor, it must be construed to mean only debts or demands about which there is no dispute, as § 299 prescribes the only mode in which disputed claims are to be collected.

It is contended on the part of the relator, that the judge had no authority to appoint a receiver in any case, until after the return of an execution. That by § 298, the judge is to appoint "in the same manner" as if the appointment were made by the court, according to § 244, and by § 244 the court could only appoint receivers according to the then existing practice, which required an execution to be returned in cases of this kind before a creditor's bill could be filed. This is a proceeding under the last clause of § 292, where the judgment debtor, after execution issued against his property, refuses to

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apply property which he has in satisfaction of the judgment. In such a case, I think the design was to authorise the appointment of a receiver without any reference to the return of the execution. This, I think, will be rendered apparent by reference to sections 297, 298, and 299. The appointment "in the same manner" only relates to the mode or form of the appointment, the case or circumstances which authorise it are found in § 292.

The judge also ordered the relator to make an assignment to the receiver appointed by him; and it is objected that the code gives no authority, neither to a court nor to a judge to order an assignment. The code, it will be seen, makes no provision for an assignment, and consequently the judge had no authority to order it. An assignment, however, in a proceeding of this kind, is probably unnecessary in order to vest the necessary title* in the receiver to enable him to prosecute demands and collect moneys due. I apprehend that the necessary title and authority for such purposes to rights and property of this description vest in the receiver immediately upon his appointment as an incident to the office without any formal assignment. (Rule 81; Chancery Rules, 192; Edwards on Receivers, 83, 354.) In regard to real estate it is different. There an assignment under seal would be necessary to transfer the title to the realty to the receiver, though perhaps he might collect rents and profits without any assignment. Doubtless the Supreme Court, by virtue of its original and inherent power and authority, and especially since the accession of equity powers and jurisdiction, may order and compel an assignment without any statutory provision. Inferior officers and tribunals must, however, show a warrant in the statute for every step they take affecting the rights of parties before them, or the proceedings will be unauthorized and void. This difficulty is in no wise removed or avoided by the liberal rule of interpretation provided for by § 467.

The relator's counsel insists that as by § 463 personal property is made to mean and include demands of this description, and by § 289, whenever an execution is issued against the property of the debtor, it is made the duty of the sheriff first to satisfy the judgment out of the personal property, the demand in question should have been levied upon and sold, and that this proceeding is entirely unnecessary. I apprehend that § 291 still restricts the operation of executions, and the levy and sale under them to their former well understood and clearly defined limits, notwithstanding the apparent confusion created by the absurd attempt to define and explain everything "in such a manner as to enable a person of common understanding to know what is intended."†

* This remark is probably intended to apply only to receivers appointed by the court, and not to receivers appointed by a judge. How does such a judge become possessed of title to property so as to transfer it to a receiver? The property is not brought before him. He has no jurisdiction except over the person of the individual brought before him, and must therefore enforce his orders if at all by operating upon and through the person required to appear, &c.

† If this is so, how can a party be guilty of refusing to apply that which the sheriff cannot take? Must he make the sheriff take it? And how and in what way, and for what amount applied? For what the debtor or creditor say the "thing in action or evidence of

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It is also contended that as the code makes no provision as to the time or manner of serving these orders, the court cannot say whether any, and if any, what particular mode of service is the proper one, and, consequently, cannot hold any to be good. The service of the order in this case was personal, and I think that must be regarded as a good service.*

Another objection is that the judge adjourned the proceedings before him from time to time, and that the code gives no right or authority to adjourn. Had the judge acquired jurisdiction in this case in the first instance, I think no advantage could have been taken here of the power exercised in adjourning, as all the adjournments appear to have been by the consent and agreement of the parties.† Where no consent is given by the party against whom the proceeding is had, the judge has no more power to adjourn the proceedings than a justice of the peace would have to adjourn a cause before him without the authority of the statute.

The details of the code in that portion relating to proceedings of this character are exceedingly loose and imperfect, and it is to be feared that great if not insurmountable difficulties will be experienced on that account in attempting to make the important and salutary general provisions available before county judges and justices at chambers.

Lord Coke in his day complained of "Acts of Parliament overlaid with provisions and additions, and many times on a sudden penned or corrected by men of none or very little judgment in

"debt" is worth? And if they cannot agree and the sheriff cannot take, is the county judge to pass upon each negotiation and decide in each case, according to his own ideas of "substantial justice, whether the debtor *"unjustly refused"* or not? And why, if the words "personal property" do not mean in § 289 what the code says in § 463 they shall mean, upon what construction can it be said that the word "property" in sections 292, 293, 294 and 299 mean what the code says it shall mean in § 464? And if the rule is not as Judge Johnson says it is, "are things in action and evidences of debt" bound by the execution, from its delivery to the sheriff, to be executed? Suppose a debtor pays his creditor after an execution issued against the latter, without knowledge of the execution, can he be compelled to pay the debt over again to the sheriff? He who pays his own debt is not a purchaser of it, in good faith. If the sheriff return the execution unsatisfied when there are debts due the person against whom it is issued, can an action be maintained against him for a false return? But if rights in action and evidences of debt are exempt from levy and sale by execution, what right has a county judge or a justice of the Supreme Court at chambers to make any orders in relation to them, in any way whatsoever? It is worthy of remark that the only refusal alleged in this case was the expression by the defendant when called upon by the sheriff with the execution, that "he (the defendant) had nothing upon which he (the sheriff) could levy *"the execution."*"

* This is undoubtedly a mistake, as it is in direct conflict with the expression that "inferior officers and tribunals must show a warrant *in the statute* for every step they take affecting the rights of parties before them, or the proceedings will be unauthorized and void." Where is the warrant "*in the statute*" for the personal service of these orders? The inferior officer or tribunal can only decide whether the orders are served as pointed out "*by the statute.*" If they have jurisdiction to decide *how* they shall be served when the statute is silent, they may direct them to be served by mail, or by putting them up in the clerk's office, or in any other way that the court or officer having jurisdiction to decide how they shall be served, may decide.

† If the court undertakes to hold jurisdiction by the consent or agreement of the party, instead of holding jurisdiction by the authority of law, may not that consent be withdrawn at any time? Can the court keep jurisdiction of a party by his consent, any longer than he does consent?

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"law." And he adds, "if acts of Parliament were after the old fashion penned and by such only as perfectly knew what the common law was, before the making of any act of Parliament concerning that matter, as also how few former statutes had provided remedy for former mischiefs and defects discovered by experience, then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace between insensible and disagreeing words, sentences and provisions as they now do." I think these reflections of Lord Coke may be very properly commended to the legislators of the present day.

All the orders and proceedings of the county judge were unauthorised and void, and must be set aside.

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Before OAKLEY, Chief Justice, and DUER and PAINE, Justices.

[*General Term.*]

STEPHEN HASBROUCK, Trustee, &c., of ADELINE PICKERING, Appellant, v. PETER H. VANDERVOORT and CHARLES L. HAYWARD, Defendants.

The rule of the common law which prohibits husbands and wives from being witnesses for or against each other, has not been repealed, or in any manner affected by the provisions of the code.

This rule is founded not upon the interest of the witness, but upon reasons of public policy. Nor can the husband be a witness for or against his wife's trustee in any suit affecting her separate estate, even though she be not a party to the suit, and it makes no difference that the husband has no interest whatever in the result of the suit.

This bill was filed for the purpose of compelling the defendants to deliver to the plaintiff certain stock, which it was alleged had been hypothecated to them to secure the payment of certain *specific debts* of William L. Pickering to them, and which had been paid by the dividends received from the stock. The defendants contended that the stock had been pledged to them as security for *all* of Pickering's indebtedness; and that they still held the stock for a large balance which Pickering owed them. The cause came on to be heard at Special Term, before Mr. Justice Campbell, and on the hearing, the plaintiff offered William L. Pickering, the husband of the plaintiff's, *cestui que trust* as a witness. The defendants objected to him as incompetent, on the ground that the husband is excluded from testifying in a case when his wife's rights and interests are concerned, by reason of the marital relation, and because it is *contrary to public policy* that he should be a witness in such a case. They also objected that he could not be a witness for the trustee of his wife's estate, wherethe legal title is vested in the trustee.

The Judge reserved the question, and received the testimony subject to the objection. The plaintiff offered no other evidence, and

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the Judge, after considering the case, ruled out Pickering's testimony, and dismissed the bill, sustaining the ground taken by the defendants. From this decree the plaintiffs appealed.

A. W. C. Noyes, in support of the appeal, made and argued the following points:

I. The right of the plaintiff to recover on the case made by the bill, was settled when this cause was before the court upon the demurrer; and upon the hearing all the material facts stated in the bill, except the tender, were proved, and no defence was established.

II. The only question now presented is, whether Mr. Pickering, the husband of Mrs. Pickering, for whom the plaintiff is trustee, was a competent witness in behalf of the plaintiff; and it is submitted that he was, and that his testimony should not have been disregarded, for the following reasons:

1. The true reason why husbands and wives are not allowed to be witnesses for each other is, that they are interested in the event of the suit; the notion that they are inadmissible from policy, and irrespective of interest in the event, seems to be pretty much given up in England as well as here. Cowen & Hill's Notes to Phil. Ev., 1555, and cases there cited. Norris Peakes on Ev., 247, ch. 3, § 4.

2. There never was, in truth, any rule that a witness was excluded from testifying *on the score of policy alone*. In the case of husband and wife, there was, until recently, such an identity of interest, especially by the husband in the wife's property, that he would be excluded from testifying in her favor on that ground alone, especially if she was a party to the suit.

3. In the present case, the trust under which the stock in question was held, with the income, was *exclusively for the benefit of the wife* during her life, with a contingent right of survivorship in the husband (case, fol. 1 to 12); and as the husband, prior to the filing of the bill, had released such contingent right, he had no interest whatever in the event of the suit. Laws of 1848, p. 307, ch. 200. Laws of 1849, p. 528, ch. 375.

4. The cases relied on as excluding him, are chiefly the following; 1 Greenleaf's Ev., § 344, 331. *Davis v. Dinwoody*, 4th Tr. R., 678. 2d Sand. S. C. R., 340. *Barry v. Mercein*, 8 Paige, 50. *Windham v. Chetwind*, 1 Burr. R., 424. *Snyder v. Snyder*, 6 Binn., 488. *Burill v. Bull*, 3 Sand. C. R., 15. 1 Phil. Ev., p. 83.

But these cases were all decided when there was less liberality in the admission of testimony, and before the adoption of the code, admitting interested witnesses to testify. Code, §§ 351, 352.

5. Before the adoption of this rule in England, and even in Massachusetts, where the rigid common law rule as to interest, still exists, a husband has been admitted as a witness in a suit brought by a trustee, for a trust fund, in which she was entitled to share. *Abercrombie v. Hickman*, 8 Adol. & E., 683. *Richardson v. Learned*, 10 Pick., 261. *Dyer v. Homer*, 22 Pick. R., 253.

So the wife has been held competent against her husband, in a suit to which he was not a party, and where his liability was only contingent. *Fitch v. Hill*, 11 Mass., 286.

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This decision was founded upon *Peake's* evidence, 128. *Norris Peake on Ev.*, 254. *Williams v. Johnson*, 2d Strange, 504.

The rule was the same in Virginia. *Baring v. Reeder*, 1 Hen. & Mumf., 154. 1 Green Ev., § 341. Note 6, and cases there cited.

6. In this case, the husband has no interest whatever, nor is he a party to, nor can he be legally benefitted by the result of the suit, nor is his wife a party. Besides, the whole legal and equitable title to the trust fund was in the trustee.

7. Nor was the husband the person for whose immediate benefit the suit was brought, nor was the demand in suit, assigned for the purpose of making him a witness.

III. There should be a decree for the plaintiff declaring that he is entitled to the stock as trustee, and directing the defendants to transfer it to him, and to account for the dividends received, with interest, and for costs.

1. The stock has been redeemed by the payments and receipts upon it.

2. A considerable surplus has been received from dividends for which the defendants should account.

3. They should pay costs, because they have set up an absolute claim to the stock, which was unfounded, and have relied upon an inequitable and unconscionable defence.

J. M. Mason, for respondents, made and argued the following points:

I. The testimony of William L. Pickering, the husband of Mrs. Adeline Pickering, the *cestui que trust*, was properly excluded by the Judge at special Term, because he was one of the parties for whose immediate benefit the suit was prosecuted, and was, therefore, incompetent. Code, § 399. Case, fol. 7.

II. Mrs. Adeline Pickering would have been incompetent as a witness in behalf of her trustee, for the same reason, and Pickering's relation as *husband*, rendered him incompetent.

III. The husband is excluded from testifying in a case where his wife's rights and interests are concerned, by reason of the marital relation, and because it is contrary to public policy that he should be a witness in such a case, and not on the ground of interest. (*Davis v. Dunwoody*, 4 Term. R., 678. 1 Greenleaf on Evidence, 384, § 334. *Ibid.*, 389, § 341. *The People v. Mercein*, 8 Paige, 50. *Erwin v. Smaller*, 2 Sandf. S. C., 340. *Pillow v. Bushnell*, 5 Barb., S. C. R., 156.)

IV. Nor can the husband be a witness for the trustee of his wife's estate, where the legal title is vested in the trustee. (*Windham v. Chetwind*, 1 Burrows, 424. *Snyder v. Snyder*, 6 Bin., 483, 488. *Burrell v. Bull*, 3 Sandf. Chy., 15. *Hosack v. Rogers*, 8 Paige, 242. *Hopkins v. Smyth*, 7 J. J. Marsh, 263. *Hopkins v. Br. Bk. of Montgomery*, 13 Ala., 455. *Hale v. Dagan*, 4 Ala., 696.)

V. The rule is not altered by the provisions of the code. The 398th section must be construed strictly, and so as to remove the disqualification of the witness, on the ground of *interest only*.

VI. But even if the testimony of Pickering is admitted, the bill

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cannot be sustained by the plaintiff. The testimony shows that the trustee had applied the stock according to the provisions of the trust deed, and that so far as this share of stock was concerned, the trust had ceased. Case, fol. 6, 7, 121-127.

VII. The judgment of the special term should be affirmed with costs.

DUER, J., delivered the opinion of the Court :

Whether the testimony of W. L. Pickering, the husband of the lady for whose benefit as a *cestui que trust* this suit is brought, was properly rejected by the Judge at Special Term, is the only question necessary to be considered. This evidence, if admitted, establishes the plaintiff's case, and if rejected, leaves it wholly unsustained by proof.

This Court has decided that the rule of the common law, which prohibits husbands and wives from being witnesses for or against each other has not been repealed, or in any manner affected by the provisions of the code. (*Erwin v. Smaller*, 2 Sand. Sup. C. R., 340.) The Supreme Court in the third district, has made a similar decision, (*Pillou v. Bushnell*, 5 Barb. S. C. Rep., 156,) and we little expected that the question which these decisions involve, would again be raised.

It is true, that with the exception of those who are parties to the suit, or for whose immediate benefit it is brought or defended, the interest of a person offered as a witness, is no longer a ground of exclusion, and if the rule of the common law to which we have referred, rested solely upon the ground of interest, it might justly be considered as abolished ; but such is not the foundation of the rule. It is founded, not upon the interest of the witness, but upon reasons of public policy, and these reasons so manifestly sound and just, that we are not at all disposed to relax the obligation or narrow the application of the rule to which they have given rise. On the contrary, we must hold it to be applicable in every case, in which the admission of the evidence has a tendency to produce the mischievous consequences which the wisdom of the law, in adopting the rule, has designed to prevent, namely, the interruption of domestic peace and harmony, and the destruction of that unreserved confidence which the marriage relation implies and requires. The peace and good order of society, the real strength of a nation, and the stability of its government spring from the charities and the virtues of domestic life, and these will be found to vanish in the proportion in which the bonds of mutual trust and mutual affection, that should unite husband and wife, are severed or impaired. The discord and distrust that separate the parents are sure to reach the children. They lose their reverence for their parents, and their sympathy with each other, and the thoughts and feelings that should endear and sanctify their home, if not wholly unknown, are soon extinguished and forgotten. Hence the hardship that may result to individuals in particular cases from the operation of the rule, is not to be compared with the evils that would flow upon society, should the safeguard it has provided be overthrown or abandoned. It may indeed be said, that these consequences are only to be apprehended, when it is against each other

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that husbands and wives are admitted to testify, but without advertising to other considerations, it is a conclusive reply, that if the testimony, when favorable, is to be received, when adverse, it cannot be rejected. Such a distinction would be an anomaly in the law, and would, moreover, be a direct temptation to perjury, and a pregnant source of injustice.

It was, however, contended by the learned counsel of the plaintiff, that although the rule of the common law may not have been changed, yet it is in truth only applicable when the husband or wife, for or against whom the testimony is offered, is a party to the suit, and that in all other cases in which the evidence has been rejected, the interest of the witness has been the sole ground of its exclusion; but we do not at all hesitate in rejecting such a limitation of the rule, not only as inconsistent with the principle upon which it is founded, but as plainly contradicted by many decisions. In *Hosack v. Rogers*, (8 Paige, 242,) the wife was not a party to the suit, and had only an eventual interest in a fund created primarily for the benefit of creditors, yet the testimony of the husband (whose interest was contingent and barely possible), so far as it tended to enlarge the fund, was struck out by Chancellor Walworth as plainly incompetent. In *Burrell v. Bull*, (3 Sandf. Chy. R. Rep., 15,) the bill was filed by the trustee of a married woman and related to her separate estate, yet the husband who, it was admitted, had no interest whatever, present or future, vested or contingent, was excluded as a witness by the Vice Chancellor, upon the sole ground of public policy.

The strongest case, and that which meets and refutes the entire argument on the part of the plaintiff is, *Davis v. Dunwoody*, (4 Term R., 678). It was an action of trespass against the sheriff, brought by the trustee of a married woman to recover the value of certain goods which the defendant had seized, under an execution against the husband. On the trial, the husband was offered as a witness to prove that the goods were not his property, but were a part of those included in the settlement, and to which the plaintiff had, therefore, a legal title, and he was admitted by the Judge upon the ground that it was not in favor of, but against his own interest that he was called to testify, since the value of the goods, if retained by the sheriff, would be applied to the satisfaction of his own debt. Upon the testimony of the husband the plaintiff obtained a verdict, but the Court of King's Bench set it aside and granted a new trial, without hearing the counsel for the defendant, and Lord Kenyon and Mr. J. Buller concurred in saying that "independently of the question of interest, 'it is now considered a settled principle of law that husbands and wives 'cannot in any case be admitted as witnesses for or against each 'other.' We are now required to overthrow a principle, which more than half a century ago these eminent Judges considered as settled, and to create an exception from a rule, which, with no doubt or hesitation, they laid down as universal. To such a request we have neither the disposition, nor, as we understand our duties, the power to accede. Vide *Langley v. Fischer*, 9 Lond. Jur., 8375, sc. 14 Law Jour., 102. *Snyder v. Snyder*, 6 Binney, 483.) Although we must hold that the law is established and certain that the husband

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cannot be a witness for or against his wife in any suit touching her separate estate, whether she is a party to the suit or not; and *vice versa*, that she cannot be a witness for or against her husband in any suit in which he is directly interested, yet we are far from asserting that the positions upon which the plaintiff's counsel relied are wholly destitute of authority, and certainly not of the semblance of authority.

Mr. Peake, in his law of evidence has said, (Peake's Ev., 128,) that in civil suits between third parties, the wife may be a witness to charge her husband, and in *Fitch v. Hill*, (11 Mass., 286,) this observation seems to have been understood by the Supreme Court of Massachusetts as meaning that the rule of exclusion is limited to the cases in which the husband or wife is a party to the suit. We doubt whether such was the meaning of Mr. Peake, and if it were, his observation is certainly not sustained by the single case to which he refers (*Williams v. Johnson*, 2 Strange, 5041). In that case the plaintiff sought to recover the value of certain articles which had been delivered to the wife of defendant, and the mother of the wife was admitted to prove that the articles had been delivered, not upon the credit of the defendant, but upon that of her own husband. As her husband, however, was neither a party to the suit, nor interested in the result, it is manifest that the effect of her testimony was not to charge or in any manner prejudice him, but simply to discharge the defendant. It is true her evidence might have led to a suit against her husband, but in such a suit she could not have been a witness, nor could evidence of her former declaration, although under oath, have been received. It cannot, therefore, be said that she was a witness against her husband within the true meaning of the rule, which excludes such testimony.

Much reliance was placed on the modern case of *Abercrombie v. Hickman*, (8 Adolph. and Ellis, 683,) in which it was alleged that the Court of King's Bench held the husband to be a competent witness in behalf of his wife, on the ground that if he was interested at all, his interest was only contingent; but upon an attentive examination of the case, we are satisfied that the true ground of the decision was, not merely that the husband had no interest, but that there was an entire deficiency of proof as to the interest of the wife herself. She was entitled to an annuity, her right to which was not in dispute, and it did not appear that the sufficiency of the fund upon which the annuity was charged, was at all dependent upon a recovery in the suit. For aught that appeared, her interest could not be affected, whatever judgment might be given. The husband, therefore, was not admitted as a witness *for his wife*.

So far as we have been able to discover, the only decisions that give any countenance to the argument on the part of the plaintiff, are the two cases in Massachusetts of *Richardson v. Learned*, (10 Pickering, 261,) and *Dyer v. Homer*, (22 Pickering, 251,) and these, it cannot be denied, bear a very close analogy to the present. In each of these cases a husband was admitted to testify, in effect, on behalf of his wife, who, as a *cestui que trust*, was directly interested in the property or fund, which was the subject in dispute, and he was admitted

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upon the ground that his personal interest, if any he had, was remote and contingent. It is a circumstance, however, which greatly detracts from the consideration to which these cases might be otherwise entitled, that in each of them the question of the interest of the husband, is that which was alone considered by the court, without the slightest allusion to the reasons of policy upon which, by the consent of all the English authorities, the rule of exclusion is in reality founded. Those reasons may have been overlooked or forgotten, but it cannot be said that they were deliberately rejected. If, however, without insisting upon this remark, we admit that *Richardson v. Learned*, and *Dyer v. Homer*, are evidence of the law as it now exists in Massachusetts, we are constrained to add, that they are a very plain departure from the law, which, in this state, has invariably been followed, and to which we hold ourselves bound to adhere. That law is that husbands and wives are not competent witnesses for or against each other, in any suit, in which either is a party, or in the event of which either has a direct and certain interest. Whether the testimony must be excluded where the interest is only future and contingent, it is not necessary to determine, since in this case the interest of Mrs. Pickering is immediate and certain.

The judgment of the Special Term must, therefore, be affirmed with costs.

Before SANDFORD, MASON, and CAMPBELL, Justices.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW-YORK,
Respondents, against JAMES PRICE, ROBERT L. CROOKE AND LYMAN
CANDEE, Appellants.

[*July Term, 1851.*]

In an action on a joint and several bond or obligation against three defendants, one of whom is principal and the others sureties, the parties defendants may be examined as witnesses for each other under the 397th section of the Code of Procedure.

This was an appeal from the decision made at special term. The facts are sufficiently stated in the opinion of the court.

H. H. Burlock, for Appellants.

H. E. Davis and *H. H. Anderson*, for Respondents.

By the Court.—MASON, J.—The defendants' counsel on the trial, called as a witness, on the part of the defendant Price, Lyman Candee, one of his co-defendants. The Plaintiffs' counsel objected to his being so examined, on the ground of his being a party defendant to the suit, and the court sustained the objection, to which decision the defendants' counsel excepted. The defendants' counsel then offered the defendant Price as a witness for his co-defendants, Crooke and Candee. The plaintiffs' counsel objected to his competency on the same ground, to wit, that he was a party to the suit, and the judge refused to permit him to be sworn on behalf of his co-defendants, and the defendants' counsel excepted.

The 397th section of the code authorizes a party to be examined

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on behalf of his co-plaintiff or co-defendant, but the examination thus taken it is provided shall not be used on behalf of the party examined. Under this section, we have held that, in an action against several defendants on a joint contract, one defendant cannot be examined on behalf of one of his co-defendants, except to prove some defence, as infancy, or a discharge personal to such co-defendant, because, as the judgment must be against all or none, the evidence must necessarily enure to the benefit of the witness.

In the present case, the complaint sets up a joint obligation by the three defendants, executed by Price as principal, and the other defendants as his sureties; but the obligation itself, when produced in evidence by the plaintiff, appeared to be several as well as joint. The question then arises, whether a separate judgment can be rendered in this action against Price or against Candee. Under the old system this could not have been done; the general rule was, that, by uniting the several obligors or contractors on a joint and several obligation in one action, the plaintiff elected to consider it as a joint obligation, and that he must abide by that election. He must recover against all or none. This was so held in the recent case of *Miller v. McCagg*, 4th Hill, 35, which was brought on a joint and several note, in which one of the makers signed as surety for the other; one of the defendants was offered as a witness for his co-defendants, under the provision of the act, (2d R. S., 447, § 15, 3d ed.) by which, where different parties to a bill or note were sued jointly, one of the defendants might examine in his behalf any co-defendant in all cases where he would have been entitled to the testimony had the suit been brought in the form theretofore used, that is, against makers and endorsers separately. The court held that different parties "meant makers and endorsers, and that two or more makers or joint endorsers made but one party." It had previously been held in *Platner v. Johnson*, (3d Hill, 476.) that in a suit against several makers of a joint and several note, the plaintiff had no right to sever the action and take judgment against one of the defendants. But the 136th section of the code, we think, authorizes a judgment in this action against either of these defendants. It provides that, if all the defendants to an action have been served with the summons, judgment may be taken against any or either of them severally, where the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone. Now, although the plaintiff in this suit had complained against the defendants solely as joint obligors, yet, on production of the bond in evidence, it was apparent that the plaintiffs could have recovered against any one of them in a separate action. We are of opinion, therefore, that the learned judge erred in excluding the defendants from being examined as witnesses for each other. After overruling several other exceptions taken by the defendants at the trial, the judge thus concludes. We are of opinion that none of the exceptions are well taken, except those which related to the exclusion of the defendants Price and Candee as witnesses for each other. On the ground of their exclusion, and on that ground alone the judgment must be reversed, and a new trial ordered.

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U. S. District Court.

[July Term, 1851.]

Before the Hon. SAMUEL R. BETTS, District Judge.

THE UNITED STATES v. JOHN L. O'SULLIVAN AND OTHERS.

A motion to quash an indictment is a proper mode of taking objections to it for want of *form* or *substance*.

It is, however, discretionary with the court whether it will quash an indictment for defect of form.

It is generally sufficient to describe a statutory offence in the words of the statute creating it, particularly so in cases of misdemeanors.

The *United States v. Smith & Ogden*, and the *United States v. Burr*, are precedents establishing the sufficiency of such indictment under the 5th section of the act of June 5, 1794.

The 6th section of the act of April 20, 1818, is substantially a transcript of that. In the *United States v. Henderson*, an indictment under this section, corresponding to that of *United States v. Burr*, decided to be good.

The particulars constituting the offence are matters of evidence and not of pleading.

The indictment in the present case held to be good in point of form.

The law of nations no less interdicts warlike aggressions made directly upon a nation at peace than the aid of one belligerent against another.

They are just cause for reprisal and war. What a nation may not lawfully do in its public capacity in respect to others, the citizens or subjects of it ought not to do in their private capacity.

Q. Whether they can be restrained or punished by the judicial tribunals therefor, under the law of nations, as part of the common law of the land?

The United States government is the first amongst civilized nations which compelled, by positive law, its citizens, individually, to observe the law of nations towards friendly powers.

The act of 1794 was not intended as merely a neutrality act.

The president invoked the legislation of Congress for further objects than the means of maintaining the neutrality of the United States between belligerents solely.

The act has been accepted by the United States government and judicial officers ever since its enactment, as extending to warlike expeditions from this country, not intended to aid one belligerent against another.

The cases of the *United States v. Smith & Ogden*, and *United States v. Burr*, clearly evince that understanding of it.

Q. Whether a direct attack by the United States, or by individuals from the United States; on a Spanish province in America, is properly a breach of neutrality, though Spain be at the time at war in Europe with a power with whom the United States is at peace?

The act of 1818 has been uniformly treated by the Executive Department and by judges of the United States courts as embracing warlike enterprises set on foot in this country against a friendly power at peace with all the world.

Such, also, according to established rules of construction, is the interpretation to be put upon the language of the act.

Held that the matters charged in the indictment constitute a violation of the statute, and the motion to quash the indictment denied on both grounds.

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The facts sufficiently appear in the opinion of the court.

J. Prescott Hall and Ogden Hoffman for the United States.

F. B. Cutting and J. Van Buren for the defendants.

BERRA, Dist. Judge.—The indictment in this case is founded upon the 6th section of the act "in addition to the act for the punishment of certain crimes against the United States," passed April 20, 1818. The provisions of the section are "that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, every person so offending, shall be deemed guilty of a high misdemeanor."

The indictment, in ninety-seven counts, charges the defendants, by themselves and in conjunction with others, with having, within the United States and at the city of New York, begun a military expedition and enterprise, and set on foot a military expedition and enterprise, and with having provided and prepared the means for a military expedition and enterprise, to be carried on from thence against Cuba, the territory and dominion of the Queen of Spain, and also against the people of the territory and colony of Cuba. Each count purports to charge the offence in the words of the statute, and the variations between them are mostly formal only and relate to the different appellations given in the indictment to the island of Cuba—or place against which the expedition was destined. The defendants move to quash the indictment, for want of averments proper and necessary to be pleaded to by them, or on which any judgment of the Court, in case of their conviction by a jury, can be rendered.

These objections relate only to the form and structure of the indictment, and if well taken do not dispose of the accusations preferred against the defendants, as they may be obviated by a new bill correcting the deficiencies of the present one.

The essential point raised by the motion and discussed with great earnestness and force on the part of the defendants, covers their liability to prosecution under any form of indictment, for the act alleged to have been committed by them. The position taken on the merits is, that the act of Congress relates solely to the maintenance of a state of neutrality by citizens of the United States, in respect to foreign states in amity with us, but at war with each other.

It will be proper to consider in the first place the sufficiency of the indictment as framed, for if that be vitally defective the defendants must be discharged from the present prosecution, and it will be labor lost to investigate and decide the main question as to the force and operation of the statute.

A doubt was suggested preliminarily on the part of the prosecution, whether it is competent for the defendants, after having plead the general issue to the indictment, to withdraw that plea and move to

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have the bill quashed; or even if the motion to quash is an appropriate one, to bring up merely technical points of pleading.

It is true the defendants, when arraigned, entered their pleas of not guilty to the indictment, but it was without the presence or advice of their counsel, and under the assurance of the Court that the plea should no way prejudice their rights, and that they should have the privilege of every defence to the indictment, when their counsel came into Court, that they were entitled to by law before the plea of not guilty was interposed. The authority of the Court, to control the order of pleading at its discretion, cannot be doubted.

The doctrine of the English books is, that by the common law the Court may, in discretion, quash an indictment for such insufficiency, as will make any judgment whatsoever, given upon any part of it against the defendants, erroneous. (Hawk. B., 2; ch. 25, § 146; 1 Chitty, C. L., Archb. Cr. Pl. 64, § 8; Bac: Ab., indict. K., Comyn Dig., indict. H., Day's ed. and notes.)

The American authorities recognise the principle fully. (Wharton, Cr. L., 130; 61, 7, § 1; Barbour, Cr. Tr. 306, ch. 7.)

But Hawkins says, the Judges are in no case bound *ex debito iustitiæ*, to quash an indictment, but may oblige the party to plead or to demur to it. (Hawk. B. 2; ch. 25, § 146.)

The first count of the indictment charges, that the defendants, on the 23d day of April, 1851, within the territory and jurisdiction of the United States of America, to wit, at the city of New York, in the Southern District of New York, and within the jurisdiction of this Court, with force and arms did, in conjunction with some other persons to the jurors unknown, begin a certain military expedition, to be carried on *from thence* against the territory of a foreign Prince, to wit, the territory of the Queen of Spain, the United States then and there being at peace with the said Queen of Spain.

The twelve counts succeeding, also count on the words *begin a military expedition*; and state the offence substantially in the same language as the first count, varying from it in some instances in averring the military expedition was to be carried on *from the United States*, and also in naming Cuba as the place against which it was to be carried on; and giving that sometimes the appellation of *territory*, dominion, colony or district, of the Queen of Spain, or of the people of Cuba.

Similar allegations are made in the counts charging the *setting on foot a military enterprise*, to the 34th count inclusive.

From the 35th to the 75th counts inclusive, the defendants are charged with having *provided the means* for carrying on a military expedition or enterprise, and from the 76th to the 97th counts inclusive, with having prepared the means for the same.

The most material exceptions taken on the part of the defendants to the frame of the indictment, are:

1. That in the 34 first counts it is not stated what acts were done by the defendants, *to begin or set on foot* a military expedition or enterprise, nor what constituted or composed the expedition, and rendered it military.

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2. That the defendants are not charged with having begun or set on foot the expedition or enterprise, with criminal intent, or knowing it to be a military one.

3. That it is not averred from what place in particular in the United States, nor at what time, the expedition or enterprise was to be carried on.

4. That the counts from 75 to 97, do not charge any *criminal intent*, or that the defendants had any knowledge of the means prepared and provided were to be employed in carrying on a military expedition.

5. That all the counts want the fulness and precision required by law, in describing a criminal offence, and connecting any person with its commission.

These objections and various minor ones, raised in the course of the argument, fall under two general considerations :

1. Whether it is legally sufficient in an indictment on this section of the statute, to describe the offence in the words of the act, and if so :

2. Whether the pleading in the present case fulfils the spirit of the rule, by designating *times and places* and *acts*, with the distinctness and precision necessary to bring the defendants within the charge of having violated the law.

In England, it is required that indictments for offences made so by statute, when of the degree of felony, shall contain the same formality and precision as on common law offences, and it is not enough to pursue the description of the offence given by the statute, but the special acts done, or ingredients of the offence, must be stated in the indictment. (1 Chitty C. L., § 22; Archb., 50; Starkie Cr. Pl., 235.)

It is unnecessary to inquire whether the United States Courts have adopted, even in cases of felony, the rigor of the common law rule of pleading in this respect. I apprehend the general practice is to charge statutory offences, carrying with them an infamous punishment, in the words of the statute constituting the offence: For instance, an assault with intent to kill, or commit a rape, or with a dangerous weapon, or making a revolt.

Be this as it may as to felonies, the rule is clear and explicit in respect to misdemeanors, that it is generally enough in an indictment to describe the offence in the words of the statute creating it, (11 Wheat, 418, *U. States v. Kelly*) where the indictment charged the defendant with an *endeavor to make a revolt*, and it was held by the Supreme Court to be a sufficient description of the offence. In the *U. States v. Gooding*, the defendant was indicted for fitting out a vessel to be employed in the slave trade—the act of Congress of April 20, 1818, having made it an offence so to do. Exception was taken that the particular acts done by the defendant were not specified. There would be, apparently, in those cases, strong reasons for requiring such statement, that it might appear upon the record an offence had been committed, and also to enable the defendant to be prepared for his defence.

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But the Supreme Court held the indictment sufficient (12 Wheat., 460).

So, on an indictment under the 3d section of the act upon which the present indictment is founded, the defendant was charged with being knowingly concerned in fitting out a vessel with intent that she should be employed in acts of hostility, &c., &c., describing the offence in the language of the statute. The court decided that it was sufficient for the indictment to charge the offence in the words of the statute. (6 Peters, 405. *U. States v. Quincy.*)

The decision in the last case has more pertinency and weight on the present question, because it had reference to a section of this very act, and because it declares a mode of describing the offence, no less general and indistinct than the present, to be all that is required in law.

In the *United States v. Mills* (7 Peters, 142) the court again assert the general rule to be, that in indictments for misdemeanors created by statute, it is sufficient to charge the offence in the words of the statute. The court further say there is not that technical nicety, as to form, necessary, which seems to have been adopted and sanctioned by long practice in cases of felony, and, with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted.

These doctrines are applied in the U. S. Circuit Courts, in indictments for misdemeanor, in a spirit as broad and liberal as that indicated by the Supreme Court. (2 Gall., 497; 2 Mason, 129, 141; 2 McLeans, 256; *ibid*, 431; Wharton, Precedence of Indictments, 608, note.) And it is worthy of notice that, even in civil actions upon penal statutes, the United States Supreme Court hold it sufficient to charge the offence, or plead matter of defence in the words of the statute. (7 Cranch, 339; 3 Wheat., 330.)

The counsel for the defendants suppose a decision of the Supreme Court of this state has marked a qualification not inconsistent with the rule declared by the Supreme Court of the United States, but which restores to indictments upon statutes a more just and desirable conformity to those founded upon common law offences. (3 Denio, 96, *The People v. Taylor.*)

I do not understand the decision in that case conflicts, in any essential particular, with those above cited; on the contrary, it seems to me to confirm, in the strongest terms, the principles upon which they rest. It was an indictment for setting on foot and for carrying on a *certain lottery*.

The State Statute made it an offence for any person to open, set on foot, carry on, promote, or draw *any lottery*, &c., (1 R. S., 665.)

The court say, all the counts based upon a lottery state the *purpose* for which the lottery was made, in the words of the statute, and that is enough to show that it was an illegal lottery. The counts also follow the statute in severally stating what was done by the defendant, to wit, that he did "*set on foot*," "*carry on*" and "*open*" a certain lottery, and in this are sufficient; neither of the counts contains any *description* of the lottery beyond a general statement of the pur-

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pose for which it was made. For the latter reason, the first, third and fourth counts were pronounced bad, but the second count was held good, because it had the averment that "a more particular description of the lottery was unknown to the jurors."

This decision may perhaps be regarded as in a degree shaken, if not overruled by that of the Court of Appeals in *Charles v. The People* (1 Comstock, 180), in which it was held that an indictment, under the same statute, for publishing an account of a certain *illegal lottery* was good without other description of the lottery or the acts done. The statute is "that no person shall by printing, etc., etc., publish an account of such *illegal lottery*."

The case of the *Commonwealth v. Dana* (2 Metcalf, 347.) seems to stand opposed to the reasoning and conclusion of the Court in *The People v. Taylor*, as to the necessity of filling out the meaning of the legislature by averments in the indictment beyond the language of the statute, see also 5 Pick., 41, 42; 6 N. Hampshire Reports, 53.)

Be that as it may, whether an indictment under the New York statute for setting on foot, or publishing an account of a lottery, must give the name of the lottery or an excuse for not setting it forth, the case of the *People v. Taylor* is pointed and distinct that no other description of *setting on foot*, or *carrying on*, or *opening* a lottery, is necessary that to aver in the words of the statute that the defendant did *set on foot*, etc., etc.

The counsel also call the attention of the Court to the State act of 1849, Ch. 278, (Sess. Laws, 403,) making it a misdemeanor "to manufacture, cause to be manufactured, sell or expose, or keep for sale or gift or part with "*slung shot*," stating that it has been adjudged by the Criminal Court for this city, that an indictment under this act following its words is bad, and that the *intent* of the party charged, to use such slung shot, must be averred and proved.

The decision undoubtedly rests upon the doctrine that when the statutory description does not give every necessary ingredient of the offence, then the indictment must aver the facts necessary to constitute the crime and such as show a *scienter* and *criminal intent* on the part of the accused. (Archb. Cr. Pl.; 64 Barbour, C. Trt., 291.) But such is not the case under the statute in question. The act charged to have been done by the defendants imports a knowledge of its criminality, and the *intent* necessary to constitute the offence described by the statute. To begin, or set on foot a military expedition from the United States against another nation, necessarily imports by force of the expressions themselves that the act was done understandingly, both as to the object and purpose for which the military expedition is prepared or set on foot, and the end it is to answer or accomplish.

After this brief consideration of the general rule in relation to indictments upon statutes for misdemeanors, and the exposition of the Supreme Court of the United States, of an indictment drawn in the language of the 3d section of the statute in question, it may be proper to advert to the evidence supplied in the action of the judiciary on the section specially under discussion, to

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ascertain whether any interpretation has been put upon it, which will throw light upon this inquiry and indicate the sense in which this act has been understood and executed.

This is a re-enactment of the 5th section of the act of June 5, 1794, with the addition of "*or of any colony, district or people,*" after *foreign prince or state*, with whom the United States are at peace. The description of the offence and the punishment are otherwise identical.

In April, 1806, indictments were presented in the United States Circuit Court for this District, against Samuel G. Ogden and William S. Smith, founded upon the 5th section of the act of June 5, 1794.

The indictments were very concise, the parties were indicted separately, (Trial of Smith and Ogden, vi and ix). The first count charges that Ogden on the 10th day of January, 1806, at the city of New York, within the district of New York, and within the jurisdiction of the United States, *did begin a certain military expedition to be carried on from thence against the dominions of a foreign Prince, to wit, the dominions of the King of Spain, the United States then and there being at peace with the said King of Spain.*

The second count, with the same preamble, avers that Ogden "did set on foot a certain military enterprise, to be carried on *from thence against the territories,*" as before.

Third count same as second, except alleging it to be "against the province of Caraccas in South America, then and there being the territory of the King of Spain.

Fourth count, same preamble, "*did provide the means, to wit, one ship or vessel called the Leander, for a certain other military expedition to be carried on from thence against the dominions of the King of Spain.*

Fifth count, same as last, and after *Leander*, adding, "one hundred and fifty men, thirty cannon, five hundred muskets, four thousand pikes, thirty tons of cannon balls, one hundred swords, one hundred and fifty quarter casks of gunpowder" for a military expedition to be carried on from thence against the province of Caraccas, etc. Sixth, and same as last, except place, to be carried on against "the dominions of some foreign state to the jurors unknown." Seventh count, same preamble, "did set on foot a certain other military enterprise to be carried on from thence against the dominions of some foreign state, to the jurors unknown."

The indictment against Smith, has the three first and last counts the same as that against Ogden; the 4th, 5th and 6th counts, also the same with those against Ogden, except in charging the means prepared and provided to be thirty men, and \$300 in money.

The prosecution in those cases touched closely upon some of the exciting topics of party politics, and they were pursued and defended with an acrimony better befitting the arena of party strifes than a tribunal of justice.

The first talents of the New-York bar appeared for the defence, and every point was combatted with all the astuteness and ardor causes so circumstanced would be apt to engender in the then state of public feeling. Messrs. Emmett, Harrison, Coldea and O. Hoffman,

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conducted the defence, and it is fair to infer that no tenable point of objection to the prosecution derivable from the law or the facts would escape the sagacity and experience of such counsel.

Pleas in abatement were interposed, and motions made to quash the indictment, because improper testimony had been laid before the Grand Jury. (*Ibid*, xxiv, xiii.)

A most earnest and protracted argument was addressed to the Court to compel the attendance as witnesses of the Secretary of State, and other heads of the departments of the general government, and the most earnest efforts renewedly made to postpone the trials; but on the various motions and discussions, it was never suggested that the form of the indictment was objectionable, either in not describing properly the offences charged to have been committed, or averring the times and places they were to be perpetrated.

It is to be remarked, that Mr. Hoffman had been Attorney General of the state of New York, Mr. Harrison United States Attorney of this District, and the eminence of Messrs. Emmet and Colden in all branches of juridical learning, gives to the omission of such counsel, to raise an objection to the indictment in form or substance when so pressed by the case, the force of the strongest argument in its support and vindication of its legal sufficiency.

On the 9th of September, 1807, after Col. Burr had been acquitted on an indictment for high treason, he was arraigned at Richmond, Virginia, before Chief Justice Marshall, on an indictment under the same section, the 5th section of the act of June 5, 1794, for beginning and setting on foot a military expedition against Mexico.

From the synopsis of the indictment given, (2 Burr's Trials, 538,) it appears to have been framed nearly identically with those against Smith and Ogden.

The offence is charged in the words of the act and in no other way; "did begin a military expedition," "did set on foot a military expedition and enterprise," against the territory and dominions of the King of Spain, against the *Province of Mexico*, and against the *territory and dominions of a foreign State unknown*.

The history of the trials of Col. Burr affords an exhibition of acumen, learning and perseverance in pressing every topic of defence supplied by legal skill and experience which is not surpassed by any case on record.

Himself a jurist of pre-eminent distinction, and assisted by Edmund Randolph, Wickham, Charles Lee, Robert Goodlee Harper, Luther Martin, Botts, &c., some of them leading lawyers of the age, the prosecutions were opposed at every point of advance, when there seemed the faintest ground for objection, and thus, for a series of weeks, was maintained a struggle against the cases set up by the government against him.

Both indictments were defeated, but it is certainly remarkable, if the one, now in question, was open to the objection that the offence was not sufficiently described, and that it was otherwise defective in form or substance, that ground should not have been then taken against it. And the more so, because it was most strenuously insisted

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that Col. Burr could not be properly prosecuted in that district for the offence; and if he could, that he ought not to be subjected to trial at that time, or at all, after his acquittal on the capital charge. In the unremitted efforts to get rid of the indictment or of the trial, it was never suggested by Col. Burr or either of his counsel, nor by the court, that the indictment in its then shape could not be maintained.

It was treated in all the motions and arguments as sufficient and valid, in point of form, and the court, in a carefully prepared opinion on the motion to reject evidence offered under it on the part of the United States, declares "that any legal testimony which shows the expedition to have been military or to have been designed against the dominions of Spain, may be received." (2 Burr's trial, 539, and Appendix.)

This case, surrounded with its attendant circumstances, augments the force of the implication derived from the trial of Smith and Ogden, that there was no valid and sound objection in law to the sufficiency of the indictments, in the form in which they were presented.

The argument, from the usage of the courts and the undoubting acquiescence of the profession in support of the sufficiency and propriety of setting forth the offence in question, in the words of the statute, is further strengthened by the recent proceedings in the United States Circuit Court for the District of Louisiana.

An indictment was presented in that court, on the 6th section of the act of 1818, against Henderson, for beginning and setting on foot a military expedition against Cuba.

I have been furnished with the form of the indictment and find it corresponds almost exactly with those in the cases of Smith and Ogden and of Col. Burr.

No demurrer or motion to quash the indictment was made on the part of the defendant; he went to trial upon it as sufficient in point of form and substance.

On the trial, evidence offered by the United States of circumstances tending to show the beginning and setting on foot a military expedition by the defendant was objected to, because those circumstances were not set forth and averred in the indictment.

The presiding judge, in a very carefully prepared and able opinion, overruled the objection and held that it was sufficient to charge the offence in the words of the statute, the particulars constituting the offence were matters of proof and not of averment.

This case then also shows that in the understanding of the Bar, the indictment was not open to exception upon its face, because of insufficiency in stating the offence, and it further shows the deliberate judgment of the court upon the precise point, that the objection cannot avail against the admissibility of evidence under the averment, so that it accordingly is sufficient as a description of the offence and also as notice to the accused of the matters he must be prepared to meet and defend himself against.

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It was unnecessary in the present indictment to aver that what the defendants did, was done by them with a criminal intent or with knowledge that it was a criminal offence. The statute does not make these particulars a part of the description of the offence, but the definition given imports a criminal knowledge and intent in those committing it.

To *begin or set on foot*, or supply means for a military expedition from the United States to be carried on against a nation at peace with the United States, as already intimated, implies in those concerned in such an adventure, a purpose and intention to do that act understandingly and intentionally, which is pronounced by the law to be a crime.

No further charge of a criminal design can be required when not exacted by the terms of the statute, than to state a course of conduct necessarily importing a purpose to do those acts which are forbidden by law.

The indictment against the defendants comports in all important particulars and nearly verbatim with those heretofore presented in the three different Circuit Courts of the United States as above referred to. I do not find, except in one count, the omission of any part of the description of the offence given by the statute, nor the insertion of averments variant from those employed in the preceding cases.

In the 19th count, it is not asserted that the military expedition was to be carried on *from any place*. This is doubtless a clerical error, but it is fatal to the count.

In some instances the allegation is, that the expedition or enterprise was to be carried on *from thence*, (in the words of the statute,) in some, *from the United States*. The argument is that the grammatical relation of the words *from thence* in several counts, is to "the city and district of New York" and not to *the United States*.

The meaning of the statute undoubtedly is, that the expedition shall be intended to be carried on *from the territory or jurisdiction of the United States*, but I apprehend an averment merely that it was to be carried on from the district of New York, would be precise and certain enough, as the court must judicially know that place to be within the jurisdiction of the United States. But all the counts add the allegation that the *act was done within the jurisdiction of the United States*, to wit, *setting on foot, beginning, &c.*, to be carried on *from thence*. No further certainty is necessary, in my judgment, to render these counts unexceptionable. The words *from thence*, as used in this statute, mean from the United States and are precisely equivalent to the *territory or jurisdiction of the United States*.

It is questionable, in my mind, whether it is allowable to state in an indictment, that the military expedition was to be carried on against the territory or dominions of a prince or state, TO THE JURORS UNKNOWN. That fact, it appears to me, should be ascertained and explicitly averred by the grand jury, and without a knowledge en-

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abling them to present that fact, they could not properly charge the crime to have been committed.

It is nearly as incongruous, in view of the object of the statute and the description there given of the offence, for the jurors to say, it is unknown to them against *what place* the expedition was designed, as for them to have asserted that the defendants did *some kind of act*, but whether it was *beginning* or *setting on foot* a military expedition, was unknown to the jurors.

If the jurors do not know against what nation the expedition was to be directed, how can they know it was a nation at peace with the United States?

I should certainly, if not controlled by authority or precedents, hold it to be an indispensable part of the description of this offence, to name the prince or state whose territories or dominions were to be invaded. These same averments were, however, employed in the three indictments referred to, and without objection, and were held allowable in civil proceedings by the U. S. Supreme Court, (*Locke v. The U. S.*, 7 Cranch, 339; *Gelston v. Hoyt*, 3 Wheat., 329,) and I shall, therefore, not decide on *this motion*, that the omission to name the friendly power against whom the enterprise is designed, is fatal to the indictment, but leave the question to be presented more solemnly by demurrer or in arrest of judgment.

In my opinion, it is not necessary to designate the particular part of the United States from which the expedition is to be carried on, nor the time when. These are matters collateral to the gist of the offence. That consists in concocting a military expedition within the United States, with a hostile purpose towards a friendly nation.

It is no part of the description of the offence, that the expedition or enterprise shall have left the United States, and, accordingly, it can be of no essential importance to allege the particular point contemplated for its departure.

The guilty purpose must be proved, and the guilty acts to be all done within the district of New-York, and it no way qualifies or affects the character of these particulars, whether the defendants intended to put off the expedition at Castine, or Galveston, or any intermediate point.

In my opinion the motion to quash the indictment for want of proper form, must be overruled.

I have given this point of the case a much more extended consideration than its importance or difficulty would seem to demand.

I have been induced to bestow more attention upon the structure of the indictment because of the extremely able argument of the counsel for the defendants on the subject, and because this particular branch of criminal pleading has not before been brought distinctly in judgment in the courts of the United States.

Independent of the controlling authorities cited in support of the mode of describing the offence pursued in this case, I think on general principles the succinctness and conciseness of description adopted here should be upheld in preference to having the pleadings crowded with multifarious details of facts, a great portion of which

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must necessarily be conjectural and thrown into the averments, to meet any possible state of proof that might chance to arise on the trial, and would not accordingly afford a specific notice to the accused of the facts relied on by the prosecution for their conviction. In libels of information on a statute to enforce forfeitures, and in defence for seizure of property as forfeited, pleading according to the terms of the statutes is held sufficient notice to the claimant and description of the offence. (7 Cranch, 339, 3 Wheat., 339.)

To aver that the defendants *set on foot* or *began a military expedition* at New-York, will apprise them as distinctly of the matter of accusation as to set forth a schedule of facts, which may enter into the preparation of such expedition.

The multifariousness of details might more embarrass than aid the defence, as it would be obvious to the defendants, that although a hundred particulars might be enumerated in the indictment, the public prosecutor on the trial might limit his evidence to a single one, and might prove that by the admissions or declarations of the defendants themselves.

There is no advantage afforded a party defendant by a multiplicity of notices ranging over an indefinite series of incidents and circumstances. The law wisely leaves these to the proof, and discards them from the pleadings.

In the present case in my opinion, it is matter for proof and not of pleading, to show what was done by the defendants in beginning and setting on foot the military expedition charged against them.

The consideration of the main question on the merits, although the one of greatest magnitude in point of principle, will be made as brief as may be consistent with a distinct expression of the views of the court upon it.

The motion to quash the indictment most legitimately attaches to the objection, that the acts charged upon the defendants constitute no violation of the act of Congress, and do not fall within the criminal jurisdiction of the court.

The authorities concur in the doctrine that if the matters alleged in the indictment are not punishable by law, the indictment will be quashed. (Wharton, Cr. L., 131; Archb. Cr. L., 64; Bac. ab. Ind. K.)

The position of the defendants' counsel is, that the acts of June 5, 1794, and of April 20, 1818, are *neutrality acts*, intended to have operation only in case of war between nations in amity with the United States, and to prevent the citizens of the United States committing acts favoring one, and hostile to another belligerent.

The argument is, that the passage of the act of 1794 was induced by the relations then existing between the United States, France and Great Britain, and more especially to check the mischief with which this country was threatened through the pretensions and conduct of Mr. Genet, the French minister.

That the legislation of Congress being invoked only to the end to declare and enforce our neutral obligations, all the provisions of the statute must be construed in subordination to that purpose, and the 5th section be regarded no more than a restriction upon our citizens

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in respect to belligerent powers, and not a substantive and independent enactment, declaring a class of offences not known to our own laws, nor recognised by the laws of nations.

It is further insisted that the construction claimed for the act of 1794 must be extended to the act of 1818, the latter being a transcript, substantially, of the former; and, also, that the incorporation in it of the act of 1817, which was, by title, avowedly a neutrality act, and nothing more, would tend to characterize the one adopting it, as a neutrality act also.

To determine the justness and pertinency of this train of reasoning, it may be important to look more closely to the foundation of the act of 1794, and endeavor to ascertain whether, in one feature more than another, it rests upon any admitted doctrine of the law of nations.

It is an infraction of that law for a friendly power to interfere in case of war, between other nations with whom she is at peace, and render aid to one belligerent against another, and such act may become a justifiable cause for reprisals and war on the part of the nation so injured. (Marten's Law of Nations, B. 8, ch. 6; Wheat. El. of National Law, 453; 4 Grotius de Jure Belli, lib. 3, cap. 17, §3.)

But there is no conceded doctrine of that law, nor any uniform usage of nations which prohibits the citizens and subjects of a neutral power enlisting in the service or taking part with either belligerent.

This, so far as it falls within the notice of publicists, appears to be a matter of municipal regulation, left to the authority of each particular government over its own subjects, and not to come within the cognizance of public law. (Grotius de Jure Belli, lib. 3, cap. 18.)

Indeed it has been made a question, and one which the United States felt themselves compelled to discuss, whether belligerent powers had not a right to enlist and enrol men in a neutral country to carry on war against nations at peace with such neutral, without impairing by those means the neutrality of such country. (Wheat.'s Elt. 471, 472.) The United States government properly repudiated the pretension and held itself bound by its relations to friendly powers to restrain within our territories the exercise of any such privilege. (Letter of Jefferson to Gov. Morris, August 16, 1793. 3 Jefferson's Writings, 269.) Still it is doubtful, whether the argument proves more than that the restraint devolves upon the municipal authority by force of the local or common law, and should be enforced by it.

The law of nations, which interdicts a neutral power, becoming a party in a war between others with which it is at peace, springs out of and rests upon that code of natural law which recognises and declares the right of every nation to remain at peace, and not to be unjustly and wrongfully driven into war by the aggressions of another. Under its doctrine non-interference is as high a duty as neutrality.

The right of every people to the undisturbed possession of its territory and independency and to repel by force every encroachment upon either, is justly placed by writers on the ethics of national law, first amongst those natural rights which it is the end of public law

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to recognise and preserve. (Martens, 69. 1 Wildman National Law, 50. Wheat. El., p. 4, ch. 1. Vattell, sec. 64. *ibid* 216, 217, 369.)

It is denounced as an act of wrongful aggression for any other power to interfere with the independency of a State or people, however objectionable may be its existing form of government or mode of administering it. (1 Kent, 21. Vattell, 49, 50, 198, 203.)

Chancellor Kent seems inclined to sanction the privilege of one nation to interfere in the domestic disturbances and insurrections of another, in behalf of the oppressed and wronged portion of the nation, when requested by it so to do (1 Kent, 21-23) ; but the doctrine is controverted with great strength of argument and authority by a later writer, who repudiates as wholly untenable the notion that one nation is clothed with authority to adjudge upon the internal affairs of another or to intermeddle with them for any cause other than the necessity of its own defence. (1 Wild. National Law, 50, 57. 1 Sparks' Washington, 382. Opinion of Gen. Washington.)

The first administration of the government of the United States found itself called upon at an early day, in taking its place in the family of nations, to enforce an observance of the rules of public law in its transactions with two belligerents, each of which was united to this country by numerous ties of interest and sympathy. (2 Marshall's Life of Washington, 283, 287, 288. 1 Gibb's Administration of Washington and Adams, 140.)

The course it would pursue in relation to those engaged in war was explicitly announced by the Proclamation of President Washington, dated April 22, 1793. (1 Waite's State Papers, 44.)

The instructions of the Treasury Department of August 4, 1793, adopted by order of the President, framed a system of regulations to govern the conduct of its public officers, in enforcing the spirit of the Proclamation in the ports and harbors of the United States, (1 Waite's State Papers, 45), and similar directions were given the Governors of States, and the troops of the United States, in respect to the interior of the country. (2 Marshall's Life of Washington, 334 & 355.)

The President, in his speech at the meeting of Congress, Dec. 3, 1793, calls for statutory enactments to sanction and enforce the principles thus promulgated by the government. (Waite's State Papers, 40.)

But to maintain our neutrality merely between belligerents was not all the exigencies the case called for, nor the whole that was contemplated by the Government.

It is manifest it did not mean to limit its action to a fulfilment towards other nations of its obligations in respect to them as belligerents alone. Its policy was of a broader character, and befitting the principle upon which it came into existence as a government, and exercised governmental powers. As the Representative of the People,—their agent, delegated by the people of the United States—the government adopted an administrative and legislative policy embracing both its direct relationship to foreign States, and the co-ordinate obligations of the citizens individually to uphold and effectuate that relationship.

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What the government might not do in its public capacity, without an infraction of the law of nations and subjecting itself to reprisals and war, it claimed the people should be prohibited doing individually, giving to its statute book the impress of that law, higher than the codes and rescripts of jurists, which inhibits doing to others, what others ought not to do to us. (Charges of Chief Justice Jay and Mr. Justice Wilson to Grand Juries, in 1793. Wharton's State Trials, 55, 62.)

It is most manifest, that, at the earliest day the subject was acted on, the United States Government intended to make the personal duties of citizens co-equal with those of the nation, in respect to acts of hostility against other States, and that the obligation was equally imperative whether those States were in peace or at war.

Mr. Jefferson in his letter to Mr. Genet, June 17, 1793, denies the right of the French Government to enlist citizens of the United States within our territories into her service, upon the authority of writers on the law of nations; and in the end puts the objection to such acts of a foreign government, upon the broad ground, that we are at peace with all nations by the law of nature. "By that law man is at peace with man, till some aggression is committed, which by the same law, authorizes one to destroy another, as his enemy. For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared, says the Secretary of State, to the Executive and to those whom they consulted, as much against the laws of the land, as to murder or rob, or to combine to murder or rob its own citizens, and as much to require punishment, if done within their limits where they have territorial jurisdiction, or on the high seas, where they have a personal jurisdiction, reaching their own citizens only. So say our laws, as we understand them. To them the appeal is made, and whether we have construed them well or ill, the constitutional judges will decide." (1 American State Papers [Foreign Relations] 124, 155.)

It is manifest from this despatch that the Cabinet then supposed that either the common law of the United States or the laws of the particular States made the acts reprobated crimes, when committed within their territories, and that individuals would thus be amenable to punishment for the robbery and murder of the subjects of a friendly nation out of our territory the same as if the offences had been committed within any particular State.

The Supreme Court of Pennsylvania in 1784, had declared the law of nations formed part of the municipal law of the State, (*Resp. v. Longchamps*, 1 Dall. 111,) and the Chief Justice of the United States, and two at least of his able associates, in 1793, expressed their opinions that the law of nations could be enforced by the federal courts, as the common law of the country, against persons indicted for its violation. (Wharton's State Trials, 52, 55, 56, 62, 83.) This doctrine is upheld by eminent lawyers of that day, writing since the events have passed. (Rawle on the Const., 10.

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Duponceau, 3, note.) But it is manifest the popular opinion was against the doctrine. (4 Tuck. Blar. App., 10.)

Appeals were accordingly made to the tribunals pursuant to the suggestion of Mr. Jefferson, both in respect to persons serving in armed vessels and with land forces against a friendly people, but it was found that the States either possessed no laws reaching the difficulty, or felt no disposition to enforce them, (2 Marshall's Life of Washington, 233, 334,) and that juries would not be governed by the law as laid down by the national judges in the federal courts. (Wharton's State Trials, 83, 88.)

In this state of the subject, the President in his speech at the opening of the next Congress, called the attention of Congress to his Proclamation and the Regulations he had caused to be adopted, to enforce neutrality, and it is most plain, he contemplated and solicited the interposition of the Legislature to compel the citizens to conform in all respects to the principles of the law of nations, recognised and observed on the part of the Government, in regard to friendly powers.

He says, "it rests with the wisdom of Congress, to correct, improve or enforce the plan of procedure, (adopted by the administration), and it will probably be found expedient, to extend the legal code and the jurisdiction of the courts of the United States to many cases, which, though dependent on principles already recognised, demanded some further provisions.

Where individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, or usurp and exercise judicial authority within the United States; or where the penalties or violations of the law of nations may have been indistinctly marked, or are inadequate, these offences cannot receive too early and close an attention, and require prompt and decisive remedies. (1 Waite's State Papers, 40. 1 American State Papers [Foreign Relations] 22.) It is to be remarked, that out of three of the above four special calls for extending the criminal code, one only directly relates to a state of neutrality, the others looking to provisions for maintaining the sovereignty and peace of the United States in their relations with foreign powers, as well in peace as at war with each other.

The act of June 5th, 1794, was passed the same session of Congress, to which the above recommendation was addressed, and it deserves notice, as evidence of the scope and design of the enactment as understood by those active in producing its passage, that Mr. Jefferson, in 1806, as President, with the concurrence of Mr. Madison, Secretary of State, caused prosecutions against Smith and Ogden and Col. Burr to be instituted, for setting on foot in the United States, warlike expeditions against Provinces of Spain, and without any allusion to the offences imputed against them being violations of our neutral obligations. (4 Jefferson's Writings, 86; ib., 103.) At these periods Spain was nominally in alliance with France, but was secretly negotiating with England and Russia to

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come into the confederacy against Napoleon, and was therefore considered by them as *quasi neutral*. (Annual Register 1806, 1807. 4 Allison's Europe.)

And when the case of Smith and Ogden came before the United States Court, Judge Patterson, without making any distinction in respect to belligerents, charged the Grand Jury that the principles of non-intervention embodied in the 5th section were founded upon the law of nations. (Smith and Ogden's Trial, p. 219 also 83.) So it seems the policy and intent of this law has always been understood by the Executive under every administration. An eminent Statesman and jurist, speaking in the name of the Government, declares its purpose was to prevent individuals being at war whilst their government is at peace. This exposition comports with the specific recommendations of President Washington.

The United States, Mr. Webster remarks, have thought the salutary law of non-intervention by our nation with the affairs of others, is liable to be essentially impaired, if while the Government refrains from interference, interference is still allowed to its subjects, individually or in masses.

The Government of the United States has not considered it as sufficient to confine the duties of neutrality and non-interference to the case of Governments whose territories lie adjacent to each other. The principle they regard the same, if those territories be divided by half the globe. The rule is founded on the impropriety and danger of *allowing individuals to make war on their own authority*, or, by mingling themselves in the belligerent operations of other nations, to run the hazard of counteracting the policy or embroiling the relations of their own Government, and the United States have been the first among civilized nations to enforce that observance of this just rule of *neutrality and peace* by special and adequate legal enactments. By these laws it is prescribed to the citizens of the United States, what is understood to be their duty as neutrals by the law of nations, and *their duty also* which they owed to the *interest and honor* of their own country. (Mr. Webster's letter to Mr. Fox, April 24, 1842. 1 Executive Documents, 27th Congress, 3d Sept. p. 127.)

The Executive Government since that period has adhered to the doctrine avowed in the above despatch and denounced as a violation of the law of the land all acts contravening the terms of the 6th section of the act of 1818. That the law applies to and prohibits the setting on foot warlike expeditions in the United States to be carried on against any friendly power, was strongly maintained and declared during the administration of Mr. Van Buren.

The President in his proclamation of Nov. 21, 1838, declares that the combination or association of citizens of the United States to disturb the peace of the dominions of a friendly nation, is a violation of the laws providing for the performance of our obligations to the other powers of the world, and of that sacred code of laws by which national intercourse is regulated. (1 Executive Documents, 3d Sept. 25th Congress, p. 34.)

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In his message to Congress the President is distinct and explicit in asserting "that military invasions by our citizens into (friendly countries) and the commission of acts of violence on the members thereof, in order to effect a change in their Government, or under any pretext whatever, have from the commencement of our Government, been held equally criminal on the part of those engaged in them, and as much deserving of punishment as would be the disturbance of the public peace by the perpetration of similar acts within our own territory." These principles the President says were cherished and established by the great and good men who declared and established our Independence, and were maintained at a highly critical period in our history, and subsequently embodied in highly penal enactments, the faithful enforcement of which he regards inseparably associated with the maintenance of our national honor. (1 Executive Documents, 3d Sept., 25th Congress, p. 5, 6.

This language of the President was applied to the non-interference provisions of the Statute and not to those which may be strictly termed the neutrality clauses, and what he solicited from Congress was a precautionary law to enable the Executive to anticipate parties attempting the commission of the offences named in the 6th section and arrest them or their means before the acts should be actually consummated.

So the Attorney General Butler, in his opinion, upon the power of the President to seize, under the act of 1818, the arms of citizens setting on foot a military expedition against Canada, assumes that the 6th section applies to enterprises such as those then carried on against Canada. (2 Opinions of Att. Gen., 1176.) Neither the President or Attorney General regard it an ingredient of the offence, that the State to be invaded, should be at war with another.

Looking at the provisions of the first section of the act of 1838, prepared as is understood with the sanction of the President, the Secretary of State and Attorney General, it seems to import a most explicit recognition that the acts done and means provided in the United States for carrying on warlike enterprises or expeditions into Canada, were in the then state of that province and the country, infractions of the 6th section of the act of 1818, and what was needful was something more than punishment by fine and imprisonment for the offences, when perpetrated, "provided," as the President says, "the parties can be found." It was a summary authority to intercept and break up the design by seizing the means provided for carrying it on, and by arresting and holding to adequate bail persons suspected of being concerned in the enterprises. Act 1838, § 1, 6, 7.)

This is all I deem necessary to be said in this connection in relation to the views of the Executive Department of the Government, antecedent and subsequent to the passage of the law, (and in this respect the acts of 1794 and 1818 may be regarded identical), showing that it was called for and always accepted and enforced as a law, no less of *non-interference* by our citizens by military expedi-

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tions against nations at peace with all the world, than one prohibiting acts of hostility in favor of any belligerent power against another in peace with the United States.

This topic, however, being the one on which the defendants chiefly rely, they insisting the act of Congress does not apply to the facts alleged against them, and the question being of great public moment to our own citizens and in our relations with foreign Governments, it is meet the subject should be considered under other aspects. And I think the import of the law collected from its face, according to the established rules of interpretation plainly denotes the intention of Congress to stamp as crimes acts done within our territories, designed to violate the peace and rights of a friendly people, whatever may be the relation of such people in respect to other nations. The cardinal consideration is, are they in amity with the United States, and if so, no persons shall be permitted within our jurisdiction, to take any warlike measures designed to disturb that peace.

We have already seen that the attention of Congress was called to the subject of this law, because of unwarrantable usurpation of powers within the United States by the French minister. He openly claimed the right, and attempted to exercise it, to commission, arm, equip and man cruisers in our ports to commit hostilities on nations with whom the French were at war, and also to recruit land forces, issue commissions to officers, and organize within and march from our territories such forces against Florida and Louisiana, the dominions of Spain, or any other enemy of France. (2 Marshall's Life of Washington, 283, 287, 288, 334, 335.)

He publicly denied the power of this government to prevent his doing such acts, and a Governor of a western State, in which a warlike expedition was setting on foot against New Orleans, when required by the President to suppress it, coincided with the French minister, and denied there was any law of the United States prohibiting the enterprise. (2 Marshall, 334, 335.)

This was in 1793.

The measures taken by Congress were designed to extend the criminal laws, and bring within them the very acts the government complained of and was endeavoring to suppress.

It is nowhere said or intimated in the Statute that this was done to maintain our neutrality in a technical sense. The act takes the title of an act "for the punishment of crimes against the United States," and only the 3d and 4th sections have express reference to acts in relation to other nations at war. The act under the same title was continued in force March 2, 1797, and made perpetual April 24, 1800.

Nothing is more common than for the Legislature to make provision in a public statute for matters beyond and distinct from the special causes which promoted its passage, and no principles of construction limits the operation of a statute to a particular mischief it remedies, when others of a kindred character are brought within its language.

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It is the constant course of legislation, in removing a special evil or mischief, to make the enactments effecting it broad enough to suppress others, whether similar in character or wholly distinct from it in their nature.

In such cases the statute is never interpreted to have relation only to the subject which more particularly called it into existence, but is made to operate in conformity to its language. Its true meaning is to be sought for in the body of the act itself. (1 Kent, 460, 463.)

Reading the act of 1794, with a view to these sensible and satisfactory rules of interpretation, it is difficult to see ground for doubt, that it does embrace and is carefully framed to include a class of offences distinct from those commonly understood to be infractions of the laws of neutrality. It devotes two sections specifically to those particular offences, and then furthermore declares to be high misdemeanors, for our citizens to enlist in foreign service or take commissions in it, or for any person within the territory or jurisdiction of the United States, to set on foot a military expedition, &c., &c., against any State, people, &c., with whom the United States are at peace.

I see no mode of satisfying this language, but in holding it comprehends all the acts denounced, when committed within the United States, against a friendly power, without respect to his relationship to other powers.

This, it appears to me, has been the acceptation in which the act has been received by our judges and most eminent jurists since its enactments.

The first instance in which the 5th section of the act of 1794 appears to have been acted upon judicially, was in the case of Bollman and Swartwout. The main point in the case related to other questions, but after the court had decided that the prisoners could not be held in the District of Columbia under imprisonment there for treason committed elsewhere, and that the facts in evidence did not prove the crime of treason, a question seems to have been made whether the prisoners were not liable to prosecution and to be detained under the 5th section of the act of 1794 for trial.

The Court say, "admitting the affidavit of Genl. Wilkinson, both prisoners were guilty of a most culpable enterprise against the dominions of a power at peace with the United States." They then rehearse the provisions of the 5th section, and remark that "there is a want of precision in the description of the offence which might produce some difficulty in deciding what cases came within it." (4 Cranch, 136, 137. The U. S. vs. Bollman and Swartwout.)

The court thereupon discharged the prisoners, because the crime of treason for which they were arrested, was not proved against them and as they were not committed for setting on foot a military enterprise against the dominions of Spain, nor was it suggested that the offence had been committed within the District of Columbia, they ought not to be detained for that cause.

The recognition of the act by the court as applicable to a warlike

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expedition from the United States against a friendly nation, without any reference to the proceeding having connection with a belligerent power, affords strong negative evidence, that the court did not regard the circumstance of such concurrence, to be an ingredient in the offence.

But this implication is made to amount to almost conclusive evidence, by the proceedings the succeeding summer in the United States Circuit Court in Virginia against Col. Burr, already alluded to. He was not indicted, for any act of aid to one belligerent against another or otherwise violating the neutrality of the United States, but for setting on foot a military expedition in this country against the dominions of a nation at peace with the United States. On that occasion the point would directly arise and be cardinal for the defence of Col. Burr, if he was only indictable under the statute, for acts in aid of one belligerent against another.

For supposing the fact that Spain, at the time, was at war with some other power with which the United States were at peace, a military expedition from the United States against the dominions of Spain in America, without concert or connection with any other belligerent, would not be regarded a violation of neutrality, on the part of the United States, but a direct act of invasion and war upon Spain. (Vattell, 360.) Each belligerent may indirectly in that manner aid the other against a common enemy; but, by making a common enemy and a common cause, the relationship of neutrality is abandoned and the attacking party becomes himself a belligerent.

The defence was direct and patent, therefore, for Col. Burr, that the matters charged against him in the indictment were no violation of the statute, inasmuch as they were not, the assistance of one belligerent against its antagonist, so that if committed by the United States the acts would amount to a breach of their neutrality, if that fact any way affected the offence. It is not to be supposed a point so apparent and vital to the cause in one aspect, could have escaped the notice of the court and defence. Col. Burr was himself a member of the United States Senate, and his counsel, Mr. Harper, a member of the House when the act passed: his counsel, Mr. Randolph, was Secretary of State, and Mr. Lee, Attorney General, the same year, and the Presiding Judge, shortly after, a member of Congress and Secretary of State.

The presiding Judge, the defendant and several of his counsel being thus lawyers and statesmen cotemporaries with the enactment of the law in question, and prominently active in the political agitations of the day, out of which the statute originated, had its purpose been solely to prevent a breach of our neutral relations with other countries, nothing could have been more familiar to the minds of those men than the fact that it was designed to have an operation so limited; and no evidence of a negative character can be more impressive and stringent, than the common assent on that trial, that the charges set forth made out a case of violation of the statute in its letter and intent.

So, also in the prosecution of Smith and Ogden, the indictment

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was for setting on foot a military expedition from the United States against Caraccas, Venezuela or Columbia, and other acts within the description of the 5th section of the Statute only.

That was also instituted under the presidency of Mr. Jefferson and the charges on which the accusation was grounded, were held by Attorney General Breckenridge to be an infraction of the act of 1794 for which the accused were subject to punishment. (1, Opinions of United States Attorneys General, 98.) Its design was to revolutionize that Province, then being in a state of peace abroad, and with no domestic insurrection or disturbance. (Encyclop. Americana Arts. Columbia, *Miranda*.)

Yet no exception was taken by the learned and zealous counsel who conducted the defence, and who brought to its support every topic which could tend to ward the prosecution from the defendants and fasten on the administration wrongful conduct and motives in instigating and directing it, nor was it suggested such a warlike expedition was no violation of the law, because it was no breach of neutral obligations. If not an innocent, commercial expedition, as the defence maintained it to be, they took the other alternative that it was direct and positive war, urged with the assent and concurrence of the government.

In such posture of the defence, the prosecution stood defeated palpably upon the indictment, if the 5th section of the act of 1794 only interdicted those acts which were in violation of the neutrality of the country. The counsel and the court took no such limited view of the case. They understood the statute according to its plain reading, and the intimation was nowhere made in the whole range of the animated and not always entirely decorous discussions on the trial, that the statute did not embrace private acts of hostility begun to be carried on from the United States against a friendly power, in the largest sense of that language.

Judge Patterson, in commenting on the provision of the act in question and its policy, says it is declaratory of the law of nations, and besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact and the very nature, scope and end of civil government. (Trial of Smith and Ogden, 83. Wharton's State Trials, 55, 62. Chief Justice Jay and Mr. Justice Wilson.)

The act of March 3, 1817, in its title and all the provisions, is strictly a neutrality act, and was occasioned by the insurrections and revolutions going on at the time in the South American and Mexican Provinces.

But so anomalous and extraordinary had been the character of hostilities and proceedings with some of those States and of citizens of the United States acting under assumed authority from them, that the attention of Congress was called to the subject by a special message of President Monroe. (1 State Papers, 15th Congress, 1st Session, pp. 4, 5, Dec. 1817.) The same session, the committee of Foreign Relations of the House of Representatives reported a bill which, after long debates and repeated amendments, ultimately be-

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came the act of April 20, 1818. (Journals, House of Reps., 15th Congress, 1st Session.) That law purports in its title, to be a *crimes act*, and not one to preserve the neutral relations of the United States. It embodies the acts of 1794 and 1817, with alterations and additions. It is not now material to collate the three statutes, but it is observable that the last marks with more precision and exactness than the preceding ones the cases of violation of neutral obligations provided against. It also creates offences not named in the acts of 1794 and 1817, and which in no sense can be arranged under neutral obligations.

For instance the 4th section, in relation to citizens of the United States being concerned, out of the United States, in privateers cruising against the property of citizens of the United States.

And it is doubtful, upon the terms of the statute, whether enlisting, within the United States, in the service of any foreign power, or going out of the United States with intent to enlist, is not made an offence, without regard to the employment of such soldier or sailor in the foreign service.

The sections of the act which in terms indicate a reference to neutral duties, are the first, fourth and fifth; the 2d, 6th and 8th have no such connection in language, and must take effect independently of that considerations, unless upon the principles of reasonable construction, they are found limited to that application.

The act has been otherwise always understood by our public functionaries executive and judicial.

President Van Buren, in his message to Congress of Dec. 3, 1836, before cited, in reference to the hostile movements on foot in this country against Canada, says, "It is by the laws already made criminal in our citizens by unauthorized military operations on their part, to embarrass or anticipate the decision of Congress, whether the country shall interfere with or be made a party to the struggle in those Provinces."

In his message of January 5, 1838 (which led to the act of 1838,) the President further says, "The existing laws are insufficient to guard against hostile invasions, from the United States, of the territory of friendly and neighboring nations. The laws now in force provides sufficient penalties for the punishment of such offences after they have been committed, and provided the parties can be found; but the Executive is powerless in many cases to prevent the commission of them, even when in possession of ample evidence of an intention, on the part of evil disposed persons, to violate our laws." (2 Executive Document, 25th Congress, 2d Session, Document 64.)

And the act of March 10, 1838, passed in compliance with the instance of the President, to aid the execution of the 6th section of the act of 1818, most manifestly indicates the understanding of Congress that the offences denounced came within the meaning of that statute, and the latter one was required in the peculiar situation of the two countries to enable the President to enforce the former according to its spirit and intent.

Mr. Webster in his correspondence with the British minister, Mr.

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Fox, on this subject, before cited, also represents the act of 1818 as covering the very case of an invasion of Canada, from the United States, in a time of peace, within and without the Provinces. (1 Ex. Doct. 27th Cong. 3d Session, p. 127.)

So, also President Taylor in his proclamation, August 11, 1849, expressly pronounces the alleged enterprises on foot in the United States against Cuba, to be a violation of the criminal laws of the United States. (3 Ex. Docs. pt. 1, 1st session 31st Congress.) The same declaration is repeated, by authority of President Fillmore, by Mr. Webster, in public instructions to the U. S. Attorneys. (Circular, Sep. 3, 1850.)

So far as the act has come within the cognizance of the United States judges, they have invariably recognized the 6th section as applicable to and designed to punish such state of facts. In 1835, the Grand Jury of this District submitted to the Circuit judges the enquiry whether it was a violation of that section, for persons to hold meetings in this city and appoint committees to provide means and make collections for the purpose of enabling the inhabitants of Texas to engage in a civil war with Mexico, now at peace with the United States.

The judges, Thompson and Betts, answered in writing, that the section applied to military expeditions to be carried on from the United States, and that the case supposed did not fall within it.

But the answer necessarily imports the opinion of the judges that such *military expedition* would be a violation of the law. (3 Ex. Docts. 25th Congress, 2d Session.

Judge Rawle, of the Local Court, New Orleans, in effect ruled the same point. (Ibid, p. 22.)

Judge Conkling, in a letter to Mr. Fillmore in Congress, on this subject, puts the same construction upon the 6th section of the act. He notes a defect in the statute in not providing sufficient precautionary means to enable the government to arrest persons entering upon such enterprises before the crime is consummated. (3 Ex. Docts. 3d Sess. 25th Congress, Doc. 35).

Judge McLean, in a matured charge delivered the Grand Jury, in relation to the hostile movements from our territories upon Canada, in 1838, declares the 6th section of the act has application to military expeditions of that character, against a people at peace with us and within itself. (2 McLean Rep. 1.)

It may be added that this court, in 1850, gave similar instructions to the Grand Jury in this District, in respect to military expeditions against Cuba, and repeated the same sentiment to the Grand Jury who found the indictment now under consideration.

In the Circuit Court at New Orleans, judge McCaleb recently instructed the Grand Jury that the act applies to the case of setting on foot or providing means for a military expedition against Cuba, from the United States; and in his charge to the Petit Jury on the trial of the indictment and after prolonged discussions upon the subject, he adheres to that interpretation of the law. (Pamphlet Report, pp. 4, 7, 29.)

After this review of the subject in its various bearings, I am pre-

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pared to say, that upon the plain language of the statute—from the circumstances which induced its passage, the double obligation of the government to keep individual citizens aloof from the conflicts of foreign powers, and to prevent their making private war upon nations at amity with this,—from the concurrent views of executive and judicial officers as to the meaning and design of the statute, that the case made by this indictment comes within the purpose and meaning of the sixth section of the act of 1818 and is a manifest violation of its provisions.

The motion to quash the indictment cannot, therefore, on these views of the subject, prevail. But I would remark that, notwithstanding my own conviction, resulting from a careful survey of the questions debated on this motion, that the acts of the defendants charged in the indictment, constitute an infraction of the sixth section of the act of 1818, and are sufficiently laid in the indictment; yet, in deference to the opinion of the distinguished counsel of the defendants, so earnestly expressed and so ably supported, I shall submit this decision to the consideration of the judge of the Circuit Court; and if he suggests a doubt of the justness of the conclusions adopted in it, or shall intimate that he does not concur in them, I will then remit the case to the Circuit Court, that the defendants may, by means of a difference of opinion of the two judges, have the points certified to the Supreme Court for final decision.

(*March Term, 1851.*)

Before the Hon. SAMUEL R. BETTS, District Judge.

JOSHUA CROSBY vs. MOSES H. GRINNELL and others.

Sea going vessels transporting merchandize for hire, are common carriers and subject to the responsibility of such when that responsibility is not qualified by an express contract or reservation. Courts never assume to engraft exceptions, beyond those indisputably settled by law, to the absolute responsibility of common carriers any more upon water than upon land.

The responsibility of a common carrier may be qualified by a custom or usage of established notoriety.

If the parties annex no qualification by agreement to the undertaking of the master, the marine law applies none. The master is bound absolutely to deliver the cargo as received, unless prevented by the act of God or public enemies.

Blowing of a vessel is a peril of the sea, and not like *sweating* an incident to navigation which cannot be prevented or avoided by human means.

A sale of the damaged cargo by the respondents, at private sale, is not one binding the libellant. It should have been sold at auction with notice to the ship owner, or at least an appraisement with notice should have been made.

This action was brought by the master of the Brig Frederick against the consignees of certain hides and coffee shipped under two bills of lading. The bill of lading was special and without the usual exception of "*perils of the sea.*"

The cargo was well stowed, and came out in good order, with the exception of about one hundred hides, which were wet.

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The consignees received the cargo and disposed of it at private sale, deducting an estimated sum for damage to the hides. When the Libel was filed they tendered the freight earned on the cargo, in part, but claimed to set off, by way of recoupement, the damage upon the hides to the claim for freight.

E. C. Benedict, for Libellant.

D. Lord, for Defendants.

BETTS, District J.—This action is brought by the master of the brig *Frederick*, to recover the balance of \$697 29 freight on a shipment of hides and other merchandize of the defendants, from the port of Rio Janeiro to New-York. Part of the hides, when delivered here, were found in a damaged condition from wet or moisture.

The libellant insisted the hides were well and securely stowed in the ship, and if injured any way on the passage, it was owing to inherent defects in the articles, or to perils of the sea, or the *blowing of the vessel*, and that for none of those injuries the ship owner is responsible.

The defendants admitted the appellant's right to freight for coffee as charged, \$567 42, and to \$29 97 for the hides, over and above the damages and deterioration sustained by them, which is claimed to be \$100, and pleaded a tender of payment of those two sums previous to the commencement of this suit, and insist the libellant is answerable to them for the injury the hides had received, equalling the balance of the freight money demanded.

The main controversy related to the question whether the libellant is liable for the injury the hides had received. If he is, he denies that the amount of that injury and his responsibility has been ascertained in a manner to bind him.

Another point between the parties is, whether the libellant has the right to apply the payment of \$597 39 made to him by the respondents to the satisfaction of the freight of the hides specifically, and the balance over to the coffee, and thus leave no disputable matter between the parties; or whether the payment must first go to extinguish the freight for coffee, leaving the question open in this action as to his liability for the injury to the hides, and whether that injury is equal to the balance of freight claimed.

The answer insists that the libellant took upon himself the responsibility of a common carrier, and is not discharged from it, if he proves the hides damaged by perils of the sea, or any other cause not being an act of God; and that the respondents are entitled to countervail the demand of the libellant for freight, by recoupement of the damages sustained by the hides.

The cargo consisted of coffee, rosewood, and about 1,100 hides, and was all discharged in good order, with the exception of 107 hides, somewhat wet and damaged.

The stowage was proved to be good, and conformably to the usage of trade, except in regard to the hides, there was evidence to show

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it was not proper to lay them on rosewood, and some witnesses asserted it was prudent and usual, if not necessary, in stowing a cargo of hides, to place a lining of hides between the main cargo and the skin or sides of the vessel.

There is nothing in the evidence to justify the inference that those hides were injured by being stowed on rosewood. There was no indication of wet or moisture in the wood when the cargo was discharged.

So, also, the vessel came into port staunch and tight, and performed other voyages to the West Indies, and brought return cargoes of sugars undamaged, without being repaired; and from those circumstances it is justly inferred, she did not damage the cargo on the voyage in question by direct leakage.

It might be uncertain upon the proofs in court, whether all the damage to the hides occurred at sea; a witness to that point (Bullard) estimates that the ratio of 40 to a 1000 of hides imported from Rio Janeiro, &c., receive shore damages before shipment to the extent of the injury these had sustained, or approximating to it; unless the terms of the bill of lading preclude the libellant raising the question in this case as it now stands.

The witnesses ascribe the wetting of the hides on the passage, not to letting in water by leakage on the hides, but to the *blowing* of the ship, which arises from throwing the water lying about the keelson, upon the sides, by the rolling and pitching of the ship, and thus forcing it through the skin or ceiling upon the cargo.

A lining of mats was placed along the sides of the ship, between them and the hides, to prevent that injury; but it was proved that mats so placed are not sufficient security, unless of good quality, and laid thick, and that hides are usually required for lining, to prevent the water or dampness penetrating to the body of the cargo.

Several witnesses, experienced in that trade and the commerce of this port, testified that damages to cargo, arising from the blowing of the ship, have never, within their knowledge, been charged upon the ship-owner; they could not say there was any established usage throwing the loss upon the shipper or underwriter.

1. It is an incontrovertible point of commercial law, that sea-going vessels, transporting merchandize for hire, are common carriers, and subject to the responsibility of such when that responsibility is not qualified by an express contract or reservation. (Angell on Carriers, § 87 to 91; 2 Kent, 599, 608, 6th ed.; 5 Cow. R., 539; *Hale v. New Jersey S. Nav. Co.*)

The only reported case in the New-York courts, which has called this doctrine in question, is *Aymar v. Astor*, 6 Cow. R., 266. Judge Story and Chancellor Kent regard that case as anomalous, and that its principle is directly reversed by subsequent decisions in the same court and Court of Errors. (2 Kent, 509, 6th ed., note 6th ed.; Story Bail., § 497; 21 Wendell, 193; *McArthur v. Sears.*)

The notion that the common-law doctrine is founded upon the *custom of the realm*, and has no operation out of the realm, is not supported by the English authorities, and is nowhere sanctioned by the

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decisions of the courts in the United States. (Angell on Carriers, § 153, note.) On the contrary, it is directly repudiated in this state. (10 John. R., 1, *Elliott v. Russell*.) The libellant was, accordingly, answerable as an insurer for the safe delivery of the goods shipped to the respondents, except in so far as that liability is qualified by his contract, express or implied.

2. The bill of lading executed by the libellant, does not correspond in form with the one in use in England and this country. It is dated Rio Janeiro, Sept. 23, 1848, and is as follows:

"I, the undersigned, captain of the American brig Frederick, at present anchored in this port, to proceed to the port of New-York, being my port of discharge, declare that it is true, I have received and stowed within the decks of the said vessel, perfectly dry and well conditioned, account of Jo Tenio Puto, eleven hundred and eighty dry hides, with hair on, on account and risk of whom it may concern, being marked and of the weight of and quantity expressed in the margin, which I bind myself to deliver at the aforesaid port, in the name of the aforesaid to Grinnell, Minturn and Co., receiving for freight one half cent per pound with five per cent. premium, and for fulfilment thereof, I bind person, goods and said vessel, and therefore have signed four bills of lading, all of equal tenor and date, of which one being fulfilled, the others shall have no validity. (Weight unknown.)

“(Signed):

JOSHUA CROSBY.”

This engagement being entered into, to be performed in New-York, it is, as to its nature, obligation and interpretation, to be governed by the law of the place of performance. (Story on Conflict of Laws, 3d ed., § 280 ; 2 Kent, 6th ed., 459, note 6.)

If the contract is not to be construed as rendering the master an insurer for the safe delivery of this cargo by express agreement, it manifestly in no way curtails his obligation as a common carrier under the law of this state. (19 Wendell, 329 ; 7 Hill, 292.)

For the libellant, it is contended, that the shipment of goods on a contract of affreightment, carries with it the implication that the ship is not responsible for perils of the sea, and that a bill of lading containing such qualification is not necessary to exempt the ship-owner from liability for any damage to goods coming within the description of losses of that character.

No case has been produced in which that principle has been adjudicated. The references above given show that no such doctrine entered into the decisions made upon this subject, or has been recognized as law by the courts.

The bill of lading, or other stipulation outside the act of affreightment, is looked to to relieve the ship-owner or master from the stringency of the obligation imposed upon him by law on his undertaking to transport goods for hire. (Abbott, 322 ; *ibid*, 382, note 1 ; 2 Story, 16, *The Nantucket Steamboat Company*.) The courts never assume to engraft exceptions beyond those indisputably settled by the

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law, to the absolute responsibility of common carriers, any more upon water than upon land.

It is further urged for the libellant, that the damages received by the hides in this instance, if not shore damage affecting them when shipped, was incurred from the *blowing of the ship* on the passage, and that such injury does not arise from perils of the sea, or any culpable act or omission on the part of the ship-master or owner.

That it is one necessarily incident to water carriage, and is no way caused by leakage of the ship or fault of stowage, and falls within the principle of the case of *Baxter v. Leeland*, decided in this court in November, 1848, in which the court held that the owner was not liable to the shipper for damage to cargo from the *sweating* of the ship on the voyage. (14 Mss. Decisions, 7.)

A bill of lading was executed in that case, and contained the exception of liability, because of "*the dangers of the seas*," or "*dangers of navigation*." The court held those forms of expression were equivalent to, and imported no more than the usual phrase, "*perils of the sea*;" but that on the proofs as to the cause of *sweating* in ships, the injury could not be properly ascribed to a peril of the sea.

The court said, tempestuous and violent weather tends to increase the difficulty, but does not produce it; all the testimony showing that it occurs in smooth and quiet voyages, where there is no straining or unusual rolling or pitching of the ship. Its causes are probably atmospheric, but whether ascribable to that source or others more occult, it cannot be properly classed with perils of the sea. It is of *ordinary* occurrence, scarcely failing to exist in any case of navigation from New-Orleans to northern ports in the cold seasons of the year. It is a quiet, secret exhalation, generated in the hold of the vessel, in no other known way produced by the winds and waves and navigation, than that those are agents and accompaniments of her transit out of a warm into a cold climate.

Although, upon these considerations, the court did not hold the ship acquitted of her responsibility as a common carrier, under the exceptions in the bill of lading, yet it was added, that the testimony in the cause proved a uniform and well understood usage in the trade between New Orleans and New-York, that injuries received by goods from the *sweating of the vessel* should be borne by the goods alone.

That case, then, in its ruling features, would meet this no farther than to decide that the ship is not exonerated from responsibility for the loss from *sweating* because exempted from liability for perils of the sea, (if this vessel could be regarded entitled to such exemption,) but that the damage falls upon the shipper because of the character of the injury *intrinsic* or *inherent* to navigation from a high to a low temperature, without regard to the condition of the ship or the stowage of the cargo; and also because from the usage of trade between New Orleans and New-York, well known to persons concerned in it, the goods, and not the ship, bear the loss under such circumstances.

I think the libellant fails proving in this case, that the *blowing* of a ship is in its character and cause analogous to *sweating*. It is,

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doubtless, as usual, or more so, because its effects are no way dependent upon change of climate, and to a greater or less degree, occurs in all voyages. The marine surveyors examined by the libellant, testify, it is occasioned by water in the bottom of the ship, thrown up between the sides and ceiling by the rolling of the ship, and thus forced through upon the cargo. This water generally lies below the reach of the pumps, but the damage more usually occurs because of the insufficient pumping of the vessel.

There is no evidence giving a different account of the cause of *blowing*. Some of the witnesses for the claimant impute the damage in this instance to *sweating* or *blowing*. They, however, state that the stowage of hides on wood, particularly rosewood, occasions a sweating often very injurious to them. It is to be remarked, upon this testimony, that in supposing the damage to have arisen from either *sweating* or *blowing*, the witnesses for the claimant all ascribe it to improper stowage, both in employing rosewood for dunnage, and in omitting to put a sufficient lining between the hides and the dunnage and the sides of the ship.

So, also, the marine surveyors say it is necessary, to protect a cargo of hides from blowing, that a lining of hides should be put between them and the sides of the vessel, of several inches thickness.

The evidence offered by the libellant, therefore, affords no ground for bringing this case within the principle recognized by the court in *Baxter v. Leeland*, for the witnesses agree in representing it a damage which might be prevented by proper stowage, or which, if the stowage is proper, is borne by the shipper or underwriter, because it arises from perils of the sea.

Captain Thompson, the marine surveyor, says underwriters pay for damages occasioned by the blowing of the vessel, as sea damage. To the same effect is the testimony of Mr. Foster, a commission merchant, engaged in the trade, and the other two witnesses, Captain Candee and Mr. Nickerson, go no farther than to say, the owner of the goods bears the loss, when there is a certificate of the marine surveyors that the stowage is good.

Mr. Foster, a partner of Nickinson, qualifies this statement by adding, that the owner bears the loss unless it amounts to an *average*, and then it is paid by the underwriter.

These witnesses, evidently, therefore, are speaking of cases in which the ship-owner is exempt, under the bills of lading, from losses arising by perils of the sea.

The responsibility of a common carrier, may, no doubt, be qualified by a custom or usage in a particular trade, or between particular ports of established notoriety. The implied assent of parties to the usage, will properly be regarded of like force between them, as an express agreement. (*Baxter v. Leeland*, and cases cited.)

The libellant claims that such custom notoriously prevails in respect to the transportation of hides, particularly from South American ports to the United States. He, however, furnishes no other evidence of it than that above recited, and evidently the witnesses do not speak of a usage in any other sense than as distinguishing the

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instances in which the consignee or underwriter bears the loss because it results from perils the ship is exonerated from, under the contract of affreightment.

To give a custom the effect of controlling the ordinary rules of law, there must be the most clear and satisfactory evidence of its long continuance and notoriety. (2 Sumner, 567. *The Schooner Reeside*. Angell on Carriers, § 230.)

It does not appear to me the evidence in this case approaches that requirement, or can be considered as pretending to anything beyond showing the usual method of adjusting losses of this description, when the goods are delivered under an ordinary bill of lading.

The bill of lading executed by the master on receiving the hides in question on board his ship, was special and peculiar in its terms.

It declares it to be true, that the libellant has received and stowed within the decks of the vessel, the hides in question, perfectly dry and well conditioned, which he binds himself to deliver at the port of New York.

There is as already observed, in this no qualification of his full responsibility as a common carrier, but on the contrary an explicit recognition of that obligation by the libellant in the express language of his undertaking, and in my opinion he must in every view of this case be answerable to the claimants for the damages received by the hides on the voyage.

The bill of lading admits the hides were *perfectly dry and well conditioned* when laden on board. This acknowledgment, however, as between the immediate parties to the bill of lading is not conclusive. (Abbott, 324, though *prima facie* evidence of the facts, 7 Mass. R., 297.)

It is still competent for him to prove, as against the shippers, a mistake of fact or misinformation in that respect. The hides were put on board in the name of the claimants, and the engagement by the bill of lading is to make the delivery to them, so that the controversy is in effect between the shipper and ship-owner.

In such circumstances the libellant would be allowed, against the *prima facie* evidence of the bill of lading, to prove the actual condition of the merchandize at the time of shipment. The acknowledgment in the bill of lading by no means necessarily imports the personal knowledge of the master of the condition of the goods—he may have acted on the report of an agent of the ship, or of the shipper himself, and the law permits him to defend himself by showing the facts as they actually existed. (M. S. S. Decisions, vol. 8.)

The method adopted by the claimants for fixing the amount of loss is not one binding the libellant. The property should have been sold at auction with notice to the ship-owner or master, or at least an appraisalment with notice should have been made, in order to affect him. (M. S. S. Decisions, 1847. 10 vol. 14. *Loewig v. The Barque Columbus*.)

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The freight on the coffee was \$567 42, and on the hides \$129 87, in the aggregate \$697 29.

Of this sum the Defendants admitted to be payable \$597 39 which they tendered and paid into court. The libellant sues for the whole freight, and the tender and payment must be regarded as made upon the gross freight, and he is not entitled to divide it and apply part to the payment of the entire freight of the hides, the residue *pro tanto* for the coffee, and then set up the unsatisfied balance as coffee freight.

The whole freight money demanded of the claimants included that for coffee and for hides. The claimants denied they were liable for the whole amount demanded, and it does not lie with the libellant to appropriate the tender and payment to the extinguishment of the contested demand and then sue for the undisputed residue as the balance due him. By receiving the payment on the general account and pursuing his action to recover beyond it, the case is open to the defendants to prove the amount paid justly extinguishes all they are legally liable to pay.

In my opinion, the defendants are entitled to compensation, by way of recoupement against the demand of the libellant, for any damage or deterioration of the hides incurred on the voyage.

A reference must be had to ascertain that damage.

A COMPENDIUM OF THE LAW AND PRACTICE OF VENDORS AND PURCHASERS OF REAL ESTATE. By HENRY J. DART, of Lincoln's Inn, Esq., Barrister-at-Law. With copious notes and references to the American and English decisions; also, a prefatory view of the existing law of real property in England and the United States. By THOMAS W. WATERMAN, Counsellor-at-Law. New-York: BANKS, GOULD & Co., 144 Nassau street. Albany: GOULD, BANKS & Co., 475 Broadway. 1851.

This is a re-publication of an English work, edited by Mr. Dart, an eminent English real property lawyer. Mr. Dart observes in his preface, "The object proposed by the author has been to produce a work, which, without being a mere elementary outline on the one hand, or a mere index of cases on the other, may supply the student with a concise and connected statement of the present law and practice affecting vendors and purchasers of real estate and the practitioner, with a portable book of reference to the recent and the most important early authorities on the subject. The work has evidently been prepared with very great care, and embraces all the law, supported by apposite cases, on this important subject.

Mr. Waterman has adapted this work to the jurisprudence of this country with great ability, and enriched it with copious notes and references; in his preface he remarks, "The present American is considerably enlarged from the English edition. The notes, which are extremely copious, contain very full citations from the English as well as American cases, and from all the works which could throw light on the subject treated. Among the more important of the latter may be mentioned—The Treatise of Sir E. Sugden on Vendors; The American Chancery Digest, *third edition*; and Mr. Barbour's Practice in the Court of Chancery. *The View of the Law of Real Property in England and the United States, by the American Editor*, though not strictly appropriate in a work confined to vendors and purchasers, is yet given as a convenient epitome of a kindred branch of the same interesting and important subject."

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[MONTHLY PART.

U. S. Circuit Court.

[*Southern District of New York.*]

ON APPEAL.

In Admiralty.

Before the Honorable SAMUEL NELSON, one of the Assistant Justices of the Supreme Court of the United States.

GEORGE TWIBELL AND OTHERS, LIBELLANTS, APPELLANTS, v.
THE STEAM TUG KEYSTONE, &C.

COLLISION.

Where a vessel is beating, and a steamboat is coming after or behind her, the former has the right, and it is her duty, to run out her tacks irrespective of the course of the latter.

If a collision takes place, and the steamboat sets up that the sailing vessel did not run out her tack, and thereby caused the collision, the burthen of proving the defence rests upon the steamboat.

Held, under the circumstances, that the steamboat failed in making the necessary proof.

Held, that where a wharf presented itself as a dangerous obstacle to a nearer approach to the shore by a vessel beating, and at the same time a collision was apprehended from an approaching and following steamboat, those navigating the beating vessel had the right of exercising ordinary judgment to go about—and throw the responsibility upon the steamboat of keeping clear of their vessel.

Held, that the vessel beating was not bound to incur a risk by coming up into the wind, and endeavoring to keep that position until the steamboat had passed.

Held, under the circumstances, that the steamboat could with proper care, having had the other vessel in view a sufficient time, have avoided any collision, and was responsible for the damages.

The facts sufficiently appear in the opinion of the Court.

F. B. Cutting and *W. Q. Morton* for libellants, the appellants.

Erastus C. and *Charles L. Benedict* for the Keystone.

NELSON, J.—The libel states that the sloop *Thomas Lynch*, with a cargo of eighty tons of coal, left Philadelphia, bound for Brooklyn, 7th November, 1848; that on the 30th of the month, when beating out of the Kills, and near the entrance into the bay of New York,

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the wind and tide against her, she had stood over to the Staten Island shore on her larboard tack, and having stood in as far as was prudent without going ashore, she went about, and had just filled away on the starboard tack, when the steam tug Keystone, having in tow several barges heavily laden with coal, bound to New York, overhauled the said sloop, and ran into her, one of the barges having struck her about midships, cutting her down to the water, and causing her to fill and sink in about ten minutes. The answer states that on the day mentioned in the libel, the steam tug, bound from New Brunswick to New York, with a heavy tow, was moving against wind and tide down the Kills, after dark, when the sloop Thomas Lynch was observed ahead, beating down the Kills, and then on the larboard tack; that the tug being a little south of the middle of the channel, the sloop crossing her bows, on the same tack, passed her a short distance, starting across the Kills on a long tack, the wind being N. N. E.; that just after the sloop had passed the tug in safety, and when only about three hundred feet ahead, and one hundred feet to the leeward, and, at the time, a considerable distance from the Staten Island shore, and under no necessity of tacking, and but a short distance from the tug, she suddenly went about on her starboard tack, bringing her broadside to the tide, then running a very strong flood, and by the joint force of the wind and tide, drifted down upon the tug so rapidly, that it was impossible to avoid the collision; and that it was caused by the sudden and unexpected attempt of the sloop again to re-cross close under the bows of the tug, after she had crossed them once in safety, and when there was sufficient room for her to continue on her course without tacking. The question on the case lies within a narrow limit; and some of the facts very material in the determination of it, are not in dispute. Both vessels were bound for the New York bay, and were coming out of the Kills, off the Staten Island shore, with a pretty strong wind and tide ahead. The sloop was ahead of the tug, on her long tack from the Jersey to the Staten Island shore, and was seen by the captain of the tug, half a mile ahead, while she was on that tack. The tug had a heavy tow, and was moving only at the rate of a mile and a half the hour. The captain of the tug first saw the sloop on her long tack, over his starboard bow. As the tug was nearer the Staten Island than the Jersey shore, the sloop must have been pretty well on her way towards Staten Island when first discovered; and then she was half a mile ahead. The sloop having run out her tack and reached the Staten Island shore, off New Brighton, came about and filled for the other tack, and had just got under way, when she came in contact with the outside tow, on the larboard side of the tug, striking her a little after midships, and cutting her to the water's edge, when she sunk. Now, it is not to be denied, under the circumstances stated, and not in dispute, but that the sloop had a right to keep her course, and run out her tack, and at the proper place and time to come about and fill for the other tack, and that it was the duty of the tug not to interfere with her, but to take care and avoid her. The captain of the tug was bound

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to assume the sloop would run out her tack, and then come about, as this was her duty as well as her right; and the burthen lies upon him to show that the sloop failed in her duty in this respect, and was in fault, by reason of which the collision happened. This burthen has been assumed, and it is asserted that the sloop failed to run out her tack, and came about unexpectedly and suddenly before she had completed it, and took the hands on board the tug by surprise, and thus produced the collision. The whole case hinges upon this allegation in the answer, and proof in support of it, and it depends on the evidence of the master and hand at the helm of the sloop, and the captain and pilot of the tug—the former proving that their vessel was within thirty yards of the wharf at New Brighton before she came about, and the latter that she was from 150 to 200 yards from the shore at the time. None of the other witnesses speak of the fact. The master of the sloop stood at the time on her bow, and had the best opportunity to judge as to the distance, and could not well be mistaken; besides, the fact was a subject of conversation between him and the man at the helm. They were both aware of the danger of the collision, from the proximity of the tug, and her unchecked advance towards them, and of the necessity of all proper measures to avoid it. They exercised their best judgment under the circumstances, the wind and tide being ahead, and somewhat strong, as to the point near the wharf, beyond which it would be unsafe to pass before coming about, and are responsible only for a sound and judicious exercise of it. Nor is there necessarily any discrepancy on this point in the evidence. The captain and pilot of the tug speak of the distance from the shore, not from the wharf, which is the material fact. Proving the distance from the shore, of itself, affords no information to aid us in determining the question at issue. To make it at all available for this purpose, the distance of the wharf from the shore should have been given. It might well be that the sloop came about 150 yards from the shore, and still had run her tack as far as permitted by the wharf. The proof, therefore, in my judgment, fails altogether to establish any fault on the part of the sloop in this respect, but the contrary. Again, it is said, the sloop should have luffed up into the wind, and held that position, instead of filling away, until the tug had passed. But this, it is agreed by the experts, would have been a perilous experiment, regard being had to the wind and tide, and that the manœuvre had to be made in the night. It was a peril to which the tug had no right to expose her, and for which there was no necessity. She was seen on her tack by the captain, some half a mile ahead, his vessel moving at the rate of a mile and a half the hour. With proper attention to his duty, and assuming that the sloop had fulfilled hers, by running out her tack before she came about, there was not the slightest difficulty in avoiding her. It required nothing beyond a proper look out and competent skill in the navigation of the tug. The captain had perfect control of her. He could have checked her speed, or stopped, at any point within the half mile, when he found her approaching too near the vessel on the tack. This he was bound to do; and no excuse that

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can be given is admissible, under the circumstances, or can be sanctioned by the court, except the establishment of the fact, that the vessel on the tack was guilty of fault, and which occasioned the accident. If she has conformed to the laws of navigation, as was done in this case, as a general rule, the captain of the steamer must so manage his vessel as to avoid her, and, if a collision occurs, he is responsible. The rule is inflexible, and should be sternly adhered to. In my judgment, it subjects the respondents in this case. The decree below must be reversed, and the case referred to the clerk, to take proof of the loss and damage.

N. Y. Supreme Court.

[*Seventh Judicial District—June General Term, 1851.*]

Before JOHNSON, SELDEN, and TAYLOR, Justices.

DRUSILLA LEWIS, APPELLANT, v. ISAAC SMITH, RESPONDENT.

WIDOW'S DOWER.

Where the husband by his last will and testament appointed his wife executrix, and several other persons executors, one of whom with the wife only qualified, and the testator by his will gave to his wife all his real and personal estate during her life, and then added the following clause—"To carry the above into full effect, I empower the executors to make sale of the fast estate, and lodge the proceeds with the executrix, who is to enjoy the same during her life." It was held that the devise was not inconsistent with her claim for dower, that she was entitled to both the devise and her dower, and was not compelled to elect between such provision and her dower. That the power given to the executors to sell the real estate and convert it into money was a mere recommendation, and not a positive direction. It seems she might have been compelled to elect between such provision and her dower, had there been a positive direction to sell the real estate.

Where a husband after marriage gave a mortgage on his real estate in which the wife did not join, and certain contracts for the sale of certain portions thereof, executed by the husband alone, and made by his will the provision above stated for her—and after his death the assignee of the mortgage and several of the persons holding contracts of purchase, one of whom was the defendant in this suit, united and filed a bill in Chancery against her and the devisees under the will, one of whom was the executor that had qualified, and served on the defendants in that suit a notice stating that the object of the suit was to foreclose the mortgage, and that they made no personal claim against the defendants, and in the bill filed by them set forth the rights of the defendants under the will, and that the widow and one of the defendants had qualified as executrix and executor—and then set forth generally that the said defendants (naming them) had, or claimed to have, some interest in the premises, as subsequent purchases, incumbrances, or otherwise; (as authorized by the 132d rule of the late Court of Chancery) but made no mention of the widow's claiming dower, or any allegation in reference thereto, and the defendants suffered the bill to be taken as confessed, and a decree of sale was made in said suit, and that the purchaser be let into possession; and upon a sale being made under said decree, the assignee of the mortgage became the purchaser, and received a Master's deed. It was held that the title acquired by the purchaser was subject to the widow's claim for dower; that her claim for dower was paramount to the mortgage, and that the decree and Master's deed was no bar to such claim for dower; that the bill was not properly framed to enable the complainants to litigate her claim to dower in that suit; that as there was no allegation in the bill relative to her claiming dower, or that the devise under the will was in lieu of her dower, she was not a party to that suit as doweress, but only as executrix and devisee, and that her claim to dower, being paramount to the mortgage, was not the subject of litigation in that suit; and that, as to that claim, she would not have been a proper party to the suit. That the bar against all parties defendants referred

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to in 2d R. S. 192, § 158, means all proper parties, and as to such rights as are properly the subject of litigation in a foreclosure suit; that is to say, the rights of the mortgagor and mortgagee, and all persons claiming under them, or either of them, not paramount claims.

The action was brought to recover dower, and the trial took place at Bath, in the county of Steuben, at the February Special Term, 1850, before the Hon. Thomas A. Johnson, without a jury, when the following facts appeared in evidence. The mortgage, after reciting that the said George Lewis was seized in fee of certain lands in the town of Reading, in the county of Steuben, and State of New York, conveyed all the right, title, and interest of him, the said George Lewis, of, in, and to all and any lands, tenements, and hereditaments whatever, situate in the town, county, and state aforesaid. The said George Lewis died in London (England), on the 28th of September, 1830, having at that place on the 28th of May previous made his will, which was on the 9th of August, 1831, established as a will of personal estate by order of the Vice-Chancellor of the First Circuit, on testimony taken under a commission issued by order of the said Vice-Chancellor, to take proof of the execution of said will. At the time of the death of the said George Lewis, he owned real estate in the States of New York, Pennsylvania, and Ohio, and after his death, and previous to the proving of the will, the widow took possession of some of the lands in Pennsylvania, and told the executor who afterwards qualified, that she would not take under the will, she would have her dower; and after the will was proved she had a suit with said executor relative to her dower in Pennsylvania, and received money for her dower in some of those lands. The complainants in the suit to foreclose the mortgage, served on the defendants a notice, stating that the object of the suit was to foreclose the said mortgage, and that they made no personal claim against them. There was an affidavit on file stating that a copy of the annexed subpœna had been served on the complainant in this suit, but no subpœna was annexed to said affidavit, nor could any subpœna be found on file. The other material facts appear in the opinion delivered by Judge Johnson, at the Special Term, which is as follows:

JOHNSON, J.—The action is ejectment for dower. The plaintiff is the widow of George Lewis, deceased, and claims her dower in certain lands of which said Lewis died seized, in the town of Reading, in the county of Steuben, in the possession of the defendant, claiming to be owner.

The defendant insisted that the plaintiff is barred of her dower in the premises, first by reason of a testamentary provision in her favor in the will of her husband, in lieu of dower, and second by reason of a decree in Chancery against her in a certain suit, in which the plaintiff and defendant were both parties.

From the evidence in the case, it appears that George Lewis was the owner in fee of about 800 acres of land in said township. That on the 6th day of July, 1826, he executed a mortgage upon said lands to the president and directors of the Manhattan Company, to secure the payment to them of about \$3,000. That prior to that

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time the said Lewis had contracted to sell to the defendant 122 acres of said land, and also various other parcels to other individuals. These contracts were included in the mortgage, and assigned with the moneys due, and to grow due, thereon. Lewis died in 1830, leaving a will, in which he left to the plaintiff all his real and personal estate during her life, and the remainder to William Elliott and her two nephews, Thomas L. De Witt and George L. De Witt, at her death, but the nephews were not to be entitled to the possession and enjoyment until they should arrive at full age. Then follows this clause, "To carry the above into full effect, I empower the executors to make sale of the fast estate, and lodge the proceeds with the executrix, who is to enjoy the whole during her life, and then to be divided as before described, but it must be understood that there must be no division until the executrix finds it convenient, as the well ascertained debts must be first paid after the decease of my wife." The division must take place as tenants in common, and not as joint tenants. The plaintiff in this suit was appointed executrix by the will, and several other persons executors, only one of whom, William Elliott, qualified and took upon himself the execution of the same with the plaintiff.

On the 15th of June, 1833, the said mortgage was assigned to James Pumpelly, and on the 16th of October, 1834, he filed his bill in the Court of Chancery to foreclose said mortgage, and for a sale of the mortgaged premises. The defendant in this suit, and the other person holding contracts from George Lewis as aforesaid, united with said Pumpelly, as complainants in the bill, to the end that they might be enabled to pay up the purchase money due on their respective contracts and obtain conveyances. The plaintiff in this suit, William Elliott, Thomas H. De Witt, and George Lewis De Witt, were made parties defendants, and were duly served with process to appear and answer, and also at the same time with notice that no personal claim was made against them. The bill stated that the plaintiff was the wife of George Lewis at his death.

The provisions of the will, so far as the disposition of the property was concerned, and the directions in regard to it, were substantially set out in the bill of complaint, and it was alleged that the defendants therein named had, "or claimed to have, some interest in the mortgaged premises, as subsequent purchasers, or incumbrancers, or otherwise," but what particular interest the complainant was not informed. The bill prayed that the executors and executrix might be decreed to pay the amount due upon said mortgage, and in default thereof, that the mortgaged premises might be sold, and all the defendants foreclosed of all equity of redemption, and claim of, in and to the said premises. The defendant did not appear, and a decree of foreclosure was taken pro-confesso, directing a sale of the premises by a Master, and that the purchaser upon receiving the amounts due upon the contracts of sale respectively, convey to the complainants who held contracts under George Lewis. The said Pumpelly became purchaser, took a Master's deed, and conveyed the premises in question to the defendant.

If this case stood upon the provisions of the will alone, I should have no difficulty in determining that the plaintiff was not barred of her dower in the mortgaged premises, of which the premises in question are a part. The testamentary provision was not in lieu of dower, either by express terms or by necessary implication, so as to put her to her election. The testator's plan seems to have been to have the whole estate converted into money by the executors, but his directions to that effect are not positive. It seems to have been left more as a recommendation, or discretionary power, than an explicit direction. The doctrine of equitable conversion would hardly apply to such a case; where it does, the widow's right of dower is regulated in equity by the nature of the property in the equity view of it (4 Kent, 50). Had the directions to convert the real estate been peremptory, the widow would, I think, have been driven to her election. Where the widow cannot have both gift and dower without breaking up the testator's plan of disposing of his estate, express words, declaring the gift to be in lieu of dower, are not necessary (*Bull v. Church*, 4 Hill, 206). This case is strong authority to show that a gift or devise of the whole estate, when nothing is said about dower, does not necessarily deprive the widow of their dower, even if she take the estate under the will and hold it until divested.

But I think the plaintiff is precluded by the decree in the Chancery suit from claiming dower in the mortgaged premises, against a purchaser at the sale, or any one deriving title bona fide from him. The plaintiff and defendant here were both parties to the suit, one object of which was to get a title to the premises in question through the mortgage foreclosure, and quiet and cut off all other rights and claims. The plaintiff was a necessary and proper party—clearly so as executrix, and also as devisee and legatee, and it seems to me as doweress under the circumstances of this case. Conceding that her right to dower was paramount to the mortgage, yet she had other rights and interests in the premises which were not, and which made her a necessary party to the suit. Being a party, and having interests which were the proper subjects of adjudication, the Court had power and might properly take cognizance of her dower right in that suit. Under the peculiar provisions of the will, she being general devisee of the whole estate, it was impossible for the complainants to know whether she intended to claim her dower in the estate, or take surplus proceeds of the mortgage foreclosure and sale under the will. Hence she was properly called upon to show what estate she had or claimed in the premises. Her rights as devisee under the will were set out in the bill of complaint, and if she claimed any thing more or different, being before the Court, it was her duty to interpose her claim. If she had then determined to insist upon her claim for dower, there was not only an opportunity, but a duty imposed upon her in regard to others to declare it. This she did not do, but on the contrary suffered the bill to be taken as confessed against her, as though her only claim to the property was as devisee under the will. I think it is now too late for her to set up her claim for dower.

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In *McGown v. Yerks*, 6 John Ch. R., 450, Chancellor Kent said, "It is the general doctrine of this Court that all parties having an interest in the subject matter of the suit, should be before the Court, to the end that their interest may be embraced by the decree, and that one suit may terminate all controversy depending on various rights." That was a foreclosure suit, and legatees, whose legacies were a prior incumbrance, were ordered to be brought in, as the Chancellor said "in order to prevent a sale of the premises from being deceptive or embarrassing to the purchaser, and injurious to the rights of the defendants." Here the plaintiff had an interest as devisee, which rendered it indispensable to the complainant that she should be a party, and she was called upon in effect to disclose any other right or claim she might have. Her silence is to be taken as a confession that she had no claim to interpose against the mortgage, and the decree must bind her against all parties to that suit, or such as claim under them. If, as was said in *Jackson v. Hoffman*, 9 Cowen, 272, "there was any valid defence to that suit, or any equitable ground on which the premises in question were entitled to exemption from the operation of the mortgage, it should then have been put forth. Having submitted to those proceedings in silence, the parties defendants cannot now be heard to impeach the title which resulted from them." It is not to be tolerated, that a party entitled to claim property under different rights when properly before the Court, shall stand in silence and suffer a title to be matured under the proceedings, and afterwards insist that one branch of his claim has not been effected. There should at some time be an end to litigation and conflicting claims. And no period is more proper than when a party has been called upon to assert his rights, and has neglected to do so. But independent of the obvious justice and sound policy of this rule, I think the statute in terms determines the precise question involved in this branch of the case, 2 R. S. 192, § 158, after providing that the Master's deed should vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, declares that such deed shall be an "entire bar against all parties to the suit in which such decree was made." If the plaintiff has lost her right to dower in these premises, it is attributable solely to her own neglect to assert her claim at the proper time, otherwise it would have been saved by the decree. But she neither objected to standing as a party defendant, or to being bound by the proceedings as to all the rights she had, she gave no intimation then, nor does she now show that it was not her intention at the time to rely solely upon the provisions of the will in her favor, at least so far as the property covered by the mortgage was concerned. The decree is conclusive against her, and the defendant is entitled to judgment.

Judgment was rendered in favor of the defendant on this decision, and the complainant appealed therefrom to the General Term, and the said Appeal was heard at the General Term of the Supreme Court, sitting in the city of Rochester, for the Seventh District, in June, 1851.

H. H. Burlock, for the plaintiff and appellant, made and argued the following points:

I. The provision made for the plaintiff in the will of her late husband is no bar to her dower. Because—

First.—The same is not declared to be in lieu of dower, nor are the terms and provisions of the will totally or in fact at all inconsistent with her claim to dower in the property devised, nor is the intention of the testator defeated in relation to any property devised to others by allowing her dower. There is no inconsistency between her dower and her rights under the will. (*Roper's Husband and Wife*, 582; *Bright's H. & W.* by Lockwood, vol. 1, 554, 555; *Inledon v. North*, 3d Atkins, 430; *Birmingham v. Kirwin*, 2d Sch. & Lef., 444, 452; *Sandford v. Jackson*, 10th Paige, 268-9; *Wood v. Wood*, 5th do. 601; *Fuller v. Yates*, 8th do. 329; *Bull v. Church*, 5th Hill, 206; Same case in Error, 2d Denio, 430; *Adsit v. Adsit*, 2d J. C. R., 448, 451, 459; *Leonard v. Steele*, 4th Barbour's S. C. R., 20.)

Second.—The power given to the executors to sell the fast estate does not give them any right to sell the plaintiff's dower right, the sale must be subject to all claims against the property, dower included. (*Wood v. Wood*, 5th Paige, 601; *Fuller v. Yates*, 8th do. 329; *Bull v. Church*, 5th Hill, 206, 2d Denio, 430; *Adsit v. Adsit*, 2d J. C. R., 448, 451, 459; *Ellis v. Lewis*, 3d Hare's Reports, 310; *Harrison v. Harrison*, 1st Keen's R., 768.)

Third.—Conceding that the plaintiff was bound to elect between the provision made for her under the will and her dower, she has never been in a situation to elect. The will never having been proved as a will of real estate, or in fact at all, the Vice Chancellor not having any power to order the issuing of a Commission. (In the matter of Hornby's Will, 2d Paige, 529; 2d R. S., 2d edition, page 67, § 63 to and including § 69.)

Fourth.—But if compelled to elect without due proof of the will, the evidence in the case shows that she elected to take her dower. (*Hawley v. James*, 5th Paige, 446.)

II. The decree in the foreclosure suit, the sale by the master, and the deed given by him to the purchaser at the sale, does not bar or estop the plaintiff from recovering her dower in this action. Because—

First.—She was not a party as doweress, but only as devisee and executrix under the will. (*Pennington v. Hanby*, 4th Mumford, 140.)

Second.—She was not a party to the mortgage given to the Manhattan Company and assigned to James Pumpelly.

Third.—The decree sale and master's deed only foreclosed the equity of redemption, and did not and could not affect the plaintiff's right of dower, which was a paramount claim to the mortgage. (2d R. S. 192, § 158; 1st R. L. 1813, page 490, § 11; *Holcomb v. Holcomb & Perry*, 2d Barbour's S. C. R. 20; *Penniman v. Hollis*, 13th Mass. R. 429; *Blake's Chancery*, 56; 4th Kent's Com., 186; 2d Barbour's Chancery Practice, 174; *Patch on Mortgages*, 462; *Powell on Mortgages*, 967 to and including 992; *Story's Equity*

Pleadings, 177; Lube's Equity, 22, 23; 1st Cruise, 87, § 12, 13—126 § 1, 2, 3; Edwards on Parties in Chancery, 91, 141, 142, 143; 5th P. Wm's. 310 in note; Chancery Cases, 215, 1656: Equity Cases abridged, 166, pl. 3; *Fleetwood v. Dooley*; M. S. Superior Court, June, 1847; *Robinson v. Townsend*, 3d Gill & Johnson, 413.)

Fourth.—The master's deed merely converted that into an absolute estate which was before conditional; it gave no greater right to the purchaser than if the testator had given a deed instead of a mortgage; that is, he took the fee subject to the Plaintiff's right of dower. The entire bar referred to in the statute *means a bar of all claim under the Mortgagor or of any one claiming under him, and the parties defendants means all persons whose rights may be foreclosed, and who are proper parties defendants.* (1st R. L. of 1813, page 490, § 11; 2d R. S. 192, § 158; *Holcomb v. Holcomb & Perry*, 2d Barbour's S. C. R. 20; Patch on Mortgages, 462; *Robinson v. Townsend*, 3d Gill & Johnson, 413.)

Fifth.—The bill was not properly framed for the purpose of litigating her right to dower. The general allegation therein only referring to some claim subsequent, and subordinate to the mortgage and not to paramount claims. (Hoffman's Chancery, vol. 2, page 135; Chancery Rules of 1830, page 61, Rule 132; *Holcomb v. Holcomb & Perry*, 2d Barbour's S. C. R. 20; *Bank of Orleans v. Flagg*, 3d Barbour's C. R. 318.)

Sixth.—If there had been any charge in the bill as to her claiming dower, she could have demurred to that part of the bill, inasmuch as her claim to dower being paramount to the mortgage was not the subject of litigation in that suit. (Lambert on Dower, 82; Spence's Equitable Jurisdiction of the Court of Chancery, vol. 2, page 706; *Delabare v. Norwood*, Lord Chancellor M. S. 3d Swans-ton, 144; *Fisher v. Barry*, Beatty's C. R. 139; *Wood v. Davies & Coleman*, 4th Bibb. 47; *Hallett v. Hallett*, 1st Paige, 18; *Eagle Fire Ins. Company v. Lent*, 6th Paige, 635; *Banks v. Walker*, 3d Barbour's C. R. 450; *Jones v. Ward*, 4th Sandford C. R. 209.)

Seventh.—The plaintiff could not therefore have set up her claim to dower in that suit; had she done so, the complainants could have excepted to the answer as to that part of it, or moved to have had it struck it out for impertinence. Besides her right to dower could only be tried on a direct proceeding for that purpose, in a court of law, or by order of the chancellor on a bill filed by her claiming dower. (*Badgley v. Bruce*, 4th Paige, 98; Park on Dower, 329.)

Eighth.—Had the complainants in that suit alleged that the devise under the will was in lieu of dower, and that the plaintiff had elected to take under the will, it might have been necessary for her to have either denied that allegation or to have demurred to that part of the bill. But even if issue had been taken in that suit as to her right of dower, and found for her, the dower could not have been assigned in that suit—a provision might probably have been inserted in the decree that the sale was to be made subject to the plaintiff's right of dower. (*Sandford v. McLean*, 3d Paige, 124.)

Ninth.—The plaintiff could not have supposed that her right of

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dower was to be at all effected by the bill of foreclosure, the notice of the object of the suit served on her was simply a notice of the foreclosure of the mortgage.

Tenth.—The other devisees under the will would have had no opportunity of contesting her right to dower, had she set it up in that suit, as there was no allegation in the bill as to her dower, and the answer would not have been served on them but on the complainants in that suit.

Eleventh.—The plaintiff's claim for dower was a mere chose in action, and she was not compelled to set up her claim in that suit. (*Siglar v. Van Riper*, 10th Wendell, 414; *Yates v. Paddock*, Ibid. 528; *Yates v. Fasset & Whitlock*, 5th Denio, 21, 29; *Bronson and Wife, &c. v. St. Peter's Church of Auburn*, 7th New York Legal Observer, 361; *Lawrence v. Miller*, 2d Comstock, 248, 257.)

Twelfth.—There is no proper proof of the service of any subpoena on the plaintiff in the suit to foreclose the mortgage.

III. The judgment for the defendant should be reversed, and a *Venire de novo* be awarded.

John M. Parker for the defendant and respondent, contra :

I. The evidence in the case shows that George Lewis, by his will, made provision for plaintiff *in lieu* of dower, which she elected to take.

If this is so, she is barred from recovering her dower. (1 Rev. Stat., 741 and 742, § 13, 14.)

It is not necessary that the provision be declared, by express words, in the will, to be *in lieu* of dower. It is sufficient, if such an *intention* in the testator is to be collected by clear and manifest implication from the provisions in the will. (*Adsit v. Adsit*, 2 John Ch. R. 448, 451; *Bull v. Church*, 5 Hill R. 206; S. C. in Error, 2 Denio R. 430.)

It is, then, a question of *intent*. Did the testator *intend* the provision to be *in lieu* of dower?

1. *Any other construction would seem to involve an absurdity.*

What is the widow's relation to the real property before assignment of dower? Her interest is a *right*, not an *estate* (4 Kent's Com. 61.)

The testator had the *entire estate*,—the wife a *right* contingent and defeasible—lacking the most striking and peculiar characteristic of property, the *jus disponendi*—she could release and discharge, but could not transfer or assign her right.

Does it not seem absurd, then, to say, that he gave to his wife the whole property and present possession of his real estate for her life, *subject* to her right in action to reduce a part of the same to possession, and to acquire a property therein.

She could not hold as doweress, without assignment of dower.

Was it his intention that she should take the whole estate under the will, and perfect her right and acquire title and possession of a part of the same as doweress?

2. *Any other construction is inconsistent with the provisions of the will.*

"A testamentary provision is deemed a gratuity, which the wife may take *in addition* to her dower, unless the testator has plainly manifested a different intention." (5 Hill R., 207.)

But she cannot take the whole estate for life, *in addition* to a part of the same.

She cannot (in other words) enjoy both gift and dower without not merely breaking the testamentary provisions, but also effecting an impossibility.

If she takes the gift, she comes, upon the death of the testator, into possession of the lands.

She cannot demand her dower, because there is no one of whom to make the demand.

She cannot bring her action, because she is already in possession.

So that she cannot enjoy both gift and dower at the *same time*—and if not at the same time, she cannot at all; because they are *colterminous estates*. If she take under the devise, which by its terms is *for life*, she cannot *ex necessitate rei*, during that period, take her dower in the same lands.

But we may be told, in answer, that the title under the devise may be defeated by what would not affect the right to dower.

If the defeasance arise from the provisions of the will, the devise is for a less estate than for life, and in such case, she may well take both.

But if the defeasance happens otherwise, an analysis of the argument will show that, in such case, she cannot, any more than if the title of the testator were perfect, enjoy both gift and dower.

For, if the estate which she takes by gift is not, when unencumbered, subject to her own right of dower—as above shown,—an incumbrance upon the estate, by a third person, cannot affect the question of the inconsistency of her taking both gift and dower.

Her dower right cannot sleep until her right as devisee is defeated by a *defeat of the gift*, and then revive.

The question in issue is, can she take both the gift *for life*, and her dower? Not a portion of the gift—for to take a portion only of the gift, so as to make it possible to take her dower, would defeat the will.

If she takes the gift, she must take *all of it*—and then the question arises can she take dower *in addition* to that all.

In *Bull v. Church* the widow took the gift *entire*, and then the dower. But there the gift was for a time less than her life, so that she could so take.

While here, to enable her to take her dower, the gift must be *defeated*.

This is but another way of saying that she cannot take both.

When therefore she claims dower, *because* the gift has been defeated, she claims it *for the very reason* that she is *not entitled* to it, viz. : that the enjoyment of both is inconsistent and impossible.

This view is supported, and this reasoning adopted, by all the cases which have settled the rule in this state.

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In *Bull v. Church* the devise was of the testator's whole estate during widowhood, (a less estate than for life,) and the court held that *therefore* she could take both gift and dower. It was so held *because* she could take her dower in addition to the devise.

In the same case in error (2 Denio R. 430) the chancellor, in giving the opinion of the court affirming the judgment of the Supreme Court, adopts the same course of reasoning—that as the gift was for a less estate than for life she might enjoy both gift and dower. He says “of course no question of dower *could* arise while she continued a widow, as she was entitled to the possession of *the whole* during that time.”

The whole reasoning of the court in both cases is based upon the fact that the widow could enjoy both gift and dower, they not being there coterminous estates.

So in *Sandford v. Jackson* (10 Paige R. 266) where the devise was to the widow during widowhood, and *until* the youngest child became of age, the court held “that her claim to dower *subsequent* to the *determination* of her *particular estate* under the will, was not necessarily inconsistent with a devise of the whole to his children after that time” (see 2 Denio R. 432.) The limitation of the proposition inferentially establishes our position.

In *Birmingham v. Kirwan* (2 Schoales and Lefroy, 444,) as cited in 2 John Ch. R., 459, the testator devised to his wife, a house and 170 acres for life, at a low rent, the court held this inconsistent with a right to dower in the *same land*, because the devise would be *inconsistent with her own title to one-third*.

The case of *Dorchester v. Effingham* (Cooper's Eq. Rep., 319) was decided, says Ch. Kent, (2 John Ch. R., 459) upon the authority of the distinction in *Birmingham v. Kirwan*.

In that case the testator devised to his wife a house and 53 acres of land, part of his real estate. The Vice-Chancellor confined the claim of dower to the *residue of the estate*,—that is, as to the house and 53 acres, she could not take both gift and dower.

This is, in principle, our case—and none of the cases conflict with it, but even those in which the right of dower has been guarded most carefully, sustain it.

3. *But beyond the general clause of gift in the will, this construction is strengthened by the particular provisions.*

The will provides, in addition to the general clause, as follows :

“To carry the above into full effect, I empower the executors to make sale of the fast estate, and lodge the proceeds with the executrix, *who is to enjoy the whole during her life, &c.*”

Justice Johnson's opinion was, that if this provision had been “a peremptory direction” the widow would have been driven to her election. But construing it as a mere recommendation he held that the gift and dower would stand together.

In this, we think the Judge erred, for the following reasons :

(1.) Whether the testator directed or recommended this disposition of the estate, his *intention* as to the dower must have been the same.

It can hardly be said that by *directing* a sale, he intended to put

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his widow upon her election, and that by *recommending* a sale he did not so intend.

Such a disposition of the estate, (the sale of the whole of it, and payment of the proceeds to the widow for her to enjoy for life,) would be inconsistent with dower—and whether he *directed* or *recommended* it the same intent was evidenced.

(2.) The inference, we think, is irresistible that the testator *supposed* the sale necessary “to carry the above into full effect”—and if so this provision is to be deemed a *direction* and not a *recommendation*.

I empower my executors to sell my fast estate in order that the provisions of my will may be carried into full effect—(which we submit is the meaning of the clause) seems to us, in the strongest sense a direction.

It is a power given, not to use at their discretion, but in order to *make effective* the provisions of the will.

4. *The plaintiff has made her election to take the provision made for her by the will.*

The statute provides (1 R. S. 742, § 14) that when a woman shall be entitled to an election—she shall be deemed to have elected to take the provision made for her by will, “unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof.”

She did not within one year either enter, or commence proceedings.

II. The plaintiff is precluded by the decree and sale in the Chancery suit, from claiming dower in the mortgaged premises, against a purchaser at the sale, or any one deriving title from such purchaser.

That suit was against this plaintiff and others to foreclose a mortgage, and obtain a sale of the mortgaged premises.

To that suit this defendant was a party complainant; and the object of it, so far as he was concerned, was, to get a title to the premises in question through the mortgage sale, and quiet and cut off all other rights and claims.

He was holding the premises under a contract of sale from George Lewis, the mortgagor, made prior to the mortgage—whether prior to plaintiff's marriage with Lewis does not appear.

To that suit the plaintiff here was a *necessary and proper party*—clearly so as executrix and devisee—and no less so as doweress.

The complainants knew that she was the widow as well as executrix and devisee of the mortgagor; but they did not know, and were not bound to know, whether her marriage was prior to the mortgage or not.

The bill therefore shows that she was the widow, and executrix, and devisee of the mortgagor—in each of which characters she was interested in the mortgaged premises—and she is therefore made a party, not in any specific or representative character, but generally.

Her rights as widow were as liable to be cut off by the foreclosure and sale, as her rights as executrix or devisee, unless she had, as widow, a good defence against the mortgage.

But however good a defence she may have had, if she omitted to set it up, it would not avail her.

The allegation in the bill that she claimed *some* interest in the premises as subsequent purchaser, or incumbrancer, or *otherwise*, but *what particular interest* the complainants were not informed, was sufficient to put her upon her defence. She was bound *then* to set it up. The complainants were claiming as against *every right* she had, and if she had the defence that her right of dower was paramount to the mortgage by reason of her marriage being prior it, she was bound then to set it forth; else the purchasers were warranted in supposing that she made no such claim; and that the mortgaged premises were not subject to her dower.

She was as much bound to set up that claim, as any other incumbrancer, brought in as a party, would be to set up and show that his lien was paramount to the mortgage, if he had such a lien; and equally bound by the decree, for omitting to make her defence.

Again—Even if the marriage had appeared in the bill to have been prior to the mortgage, the fact, alleged in the bill, that George Lewis by his will gave her all his estate for life, was sufficient to raise the question which we now raise, in regard to the effect of that provision on her right of dower.

She should, *for that reason*, have come with her claim of dower, and denied that the provision was *intended* to be in lieu of dower, or, that she had elected to receive it.

It was competent, upon the facts alleged, for the court to adjudge it to have been in lieu of dower, and therefore to bar her in the decree.

At all events, in the language of Justice Johnson's "opinion" in the case.

"Under the peculiar provisions of the will, she being general devisee of the whole estate, it was impossible for the complainants to know whether she intended to claim her dower in the estate, or take the surplus proceeds of the mortgage foreclosure and sale, under the will.

"Hence she was properly called upon to show what right she had or claimed in the premises. Her rights as devisee under the will are set out in the bill of complaint, and if she claimed anything more or different, being before the court, it was her duty to interpose her claim. If she had then determined to insist upon her claim for dower, there was not only an opportunity but a duty imposed upon her in regard to others, to declare it."

The suffering the bill to be taken as confessed, was an admission that the allegations in it were true, and that she had no valid defence to the claim made by the complainants, except such as appeared from the bill itself. (*Christie v. Bishop*, 1 Barb. Ch. R., 105, 118.)

That the effect of the decree and sale is to bar the plaintiff from her dower, the following cases are in point: *McGown v. Yerks*, 6 John. Ch. R., 450; *Jackson v. Hoffman*, 9 Cow. R., 272; *Mills v. Dennis*, 3 John. Ch. R., 367; *Frelinghuysen v. Colden*, 4 Paige R., 204; *Le Guen v. Gouverneur*, 1 J. Cas., 436, 492, 500; 5 Denio, 29.

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But independent of the obvious justice and sound policy of the rule, the statute in terms determines the precise question involved in this branch of the case.

2 Rev. Stat. 192, § 158, 1st Ed., declares the effect of the Master's deed as follows :

"Such deeds shall be as valid as if the same were executed by the mortgagor and mortgagee, and shall be an *entire bar* against *each of them*, and against *all parties to the suit* in which the decree for such sale was made, and against their heirs respectively, and all claiming under such heirs."

I wish here to refer to that part of Justice Johnson's opinion which relates to this branch of the case, and make it a part of my argument—inasmuch as it seems to me entirely conclusive on this point.

H. H. Burlock in reply, said, That her taking possession of the real estate under the will, did not prevent her from demanding her dower of the devisees under the will; that although she might not be obliged to demand the same while in possession under the will, yet if she was deprived of that possession by creditors, or the devisees, she might then claim her dower; that the case of *Bull v. Church* showed that she could maintain the action after her possession under the will had ceased, and, in fact, virtually decided that if the widow in that case had been divested of her possession under the will previous to her re-marriage, she could then have maintained her action to recover her dower. That in the case of *Dorchester v. Effingham*, (Cooper's Equity Reports, 319,) no question arose as to the wife's right of dower in the house and 53 acres of land. That the power given to the executors to sell was merely advisory, as the testator must have supposed that the real estate might not be sold by the executors, for he speaks of the division between the residuary devisees taking place between them as tenants in common, and not as joint tenants. But if otherwise, the authorities referred to in the second subdivision of the appellant's first point show that the sale must be made subject to the wife's right of dower, as that is a legal right of hers over which the husband has no direct control. That the interest of Mrs. Lewis in the real estate of her husband at the time of his death was—

First—Her dower to be set off, being one-third part thereof during her life.

Second—The other two-thirds during her lifetime, as devisee under the will. The first of which would not be subject to the debts of the husband, but the latter would. That the will could have full effect, and she be entitled to her dower.

TAYLOR, J.—The facts in this case are found in the printed opinion of the Judge, who decided the cause at the Special Term. It is, therefore, unnecessary for me to repeat them.

The question whether the provision made by the will of Lewis for the complainant, was in lieu of dower, was disposed of by the Judge

at the Special Term, and as no appeal was taken from that part of his decree, it is also unnecessary for me to take further notice of it.

The bill filed by Pumpelly and others, for foreclosure, made the complainant a party defendant, and she was stated in that bill to have been the wife of Lewis, the mortgagor. The complainant was made a defendant, as executrix and devisee under the last will and testament of George Lewis, her husband and the mortgagor, and after setting forth in the charging part of that bill her interest as such executrix and devisee, it goes on to state that Drusilla Lewis and others named, have, or claim to have, some interest in the mortgaged premises, as subsequent purchasers, incumbrancers or otherwise, without specifying any particular interest or claim. But in the whole bill there is no description of, or reference to, the interest or claim of the widow for dower. She was not made a party as doweress, but as devisee, and in the character of an executrix alone.

I cannot think that the paramount title of the widow can be cut off, by such a proceeding, although she be nominally a party to the suit.

She is called upon to answer the matters set forth in the bill, she examines that bill, and finds that matters are particularly specified, in which she has an interest as executrix and devisee, but to which she has no answer to make. Relying upon the fact that the pleading which she is summoned to answer makes no mention of an interest, held in her own individual right as the widow of the mortgagor, I think she was not bound by any rule of equity pleading to answer those matters; but was justified in the belief that those interests of hers were not designed by the complainants to be brought into litigation in that suit, and this view of the case is fully sustained by that of *Bank of Orleans v. Flagg*, 3 Barbour's Ch. Rep., 318, where the Chancellor says, "The bill in this cause was not properly framed. To enable them to litigate that question, instead of alleging falsely, that he had or claimed some interest in the premises, which had accrued subsequently to their mortgage, the bill should have stated that he claimed an interest, under a contract to purchase prior to the mortgage, or in other words, the bill should state the facts truly as they existed, so far at least as not to mislead the opposite party of the object of the suit. This was purely a bill of foreclosure. Now it is a rule of equity, that no facts are properly in issue, unless charged in the bill; nor can relief be granted for matters not chargeable, for the Court pronounces its decree *secundum alligator et probata*, Story Eq. Pl. 259, 3 Wood, § 55, and they can pronounce upon nothing else. I am of opinion that under this bill there was nothing alleged which called upon the complainant to interpose an answer setting forth her inchoate right of dower. *Elliott v. Fell*, 1 Paige, 269. The case of *McGowan et al. v. Yerks et al.*, 6 Johns. Ch. 450, did not, as I conceive, settle any question raised in this case. The purport of that decision was that all parties interested should be brought in, as a duty of the complainant, to the end that the sale may not be deceptive to the purchaser, but not that the rights of the prior incumbrance would be otherwise affected.

In reference to the question now before us the Chancellor says, where the land is to be sold, it would be essential to all concerned, and necessary to prevent a sacrifice, that the value and extent of the prior incumbrance, *made known by the pleadings*, should be ascertained and declared. In this case no such incumbrance was made known by the pleadings, and if the omission was erroneous or improper, that was the fault of the complainants in the foreclosure suit. In the case of *Jackson v. Hoffman*, 9 Cowen, 271, the remark of Sutherland, J., that the defendant, and those from whom he derived title, having been parties to the suit in Chancery instituted for the foreclosure of the mortgage, were estopped from denying the title of any *bona fide* purchaser at the sale, under the decree of foreclosure, was perfectly correct. The defendants were not only parties to the suit, but were subsequent purchasers, and made parties as such. It would certainly then be improper for them to set up in an action of ejectment following a sale on the foreclosure suit, an equitable defence which might have been made in that former suit.

The doctrine as laid down in *Le Guen v. Gouverneur and Kemble*, 1 Johnson's Ca., 436, that the judgment or decree of a Court possessing competent jurisdiction, shall be final as to the subject matter thereby determined, is well settled, though the correctness of the other branch of the opinion of Radcliffe, J., that it is not only final as to the matter actually determined, but as to every other matter which they neglect to litigate in the cause, and which the Court might have decided, has with good reason been questioned. But admitting it to be correct, I still think it does not reach the case at bar, inasmuch as the Court could not have decided, any matters not brought before them, by proper charges in the bill. *Elliot v. Pell*, 1 Paige, 269.

It is well settled that the mortgagee cannot, in filing his bill for a foreclosure, make one claiming a paramount title adversely to that of the mortgagor, and prior to the mortgage a defendant in the suit, for the purpose of contesting the validity of such adverse claim of title. *Eagle Fire Co. v. Lent*, 6 Paige, 637.

It is a general rule that the proper parties in a foreclosure suit are the parties to the mortgage and subsequent incumbrancers, either under the mortgagor or mortgagee, and when prior incumbrancers are made parties, it is only that the amount of such incumbrances may be ascertained, to be paid out of the proceeds of the sale, or that the premises may be sold subject to such known incumbrance. 2 Barbour S. C. R. 21, *Holcomb v. Holcomb et al.*

The right of dower was certainly a claim paramount to those of the complainants, either under the mortgage or the contracts, and they therefore could not call upon the widow to litigate that right with them in the foreclosure suit. Many cases show that such a suit could not be sustained. 2 Schoales and Lefroy, 199; *Hallett v. Hallett*, 2 Paige, 18; *Banks v. Walker*, 8 Barb. Ch. R., 408; 4 Sandford, 209.

I do not see how the statute, 2 R. S., 192, § 158, cuts off the claim of dower. I am not able to perceive how the widow was indivi-

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dually a party to the foreclosure suit, so that a decree should abrogate her rights. She was not called into Court in such capacity, but solely as executrix and devisee, and therefore was not a party to the suit, as litigant, on account of her dower. And besides it would be an act of injustice, which the statute never contemplated, for a decree in a Chancery suit, to cut off and abrogate paramount rights of parties, when those rights had not been subjected to litigation by the form or substance of the pleadings in the case. The bill in the foreclosure suit was so framed as to lead no one to suppose that the dower right of the widow would be called in question. I think the bar against the parties in the suit mentioned in the statute, refers, first, only to the proper parties—namely, mortgagors and mortgagees, and subsequent incumbrancers, and to such rights as have been properly the subject of litigation in the foreclosure suit.

I think the judgment of the Court below must be reversed.

PORTER *ag't.* WILLIAMS and CLARK.

Where proceedings supplementary to execution are instituted under the Code, the order for the debtor's examination under the 292d section gives the judgment creditor the same lien upon the debtor's equitable assets which he acquired under the former practice by the commencement of a suit by creditor's bill. And the orders authorized by the 297th and 298th sections, themselves, and without an assignment by the debtor, divest his title in the personal property and vest it in the receiver.

W., on the 5th of January, assigned to C. all his property for the benefit of creditors, with power to sell *either for cash or credit*. This assignment is void (2 *Comst.* 365). On the 28th of March an order was made in proceedings supplementary to execution against W., and on the 4th of April P. was appointed a receiver of W.'s property. On the 30th of March W. executed a further instrument to C. declaring that it was intended that C. should sell for *cash* only.

Held, that P., the plaintiff, had acquired a lien on the 28th of March, which rendered ineffectual the instrument of the 30th of March, even if otherwise of any effect.

Held, also, that W. could not at any time after the execution of the assignment to C. revoke the authority therein contained to sell upon credit, and that the instrument subsequently executed was of no avail to render the assignment valid.

Demurrer. The action was brought by the plaintiff, as receiver, to set aside an assignment executed by the defendant Williams to the defendant Clark. The assignment was made on the 5th of January, 1850. It embraces all the property and effects of the assignor, except such articles as are by law exempt from levy and sale. It is made for the benefit of creditors, giving preferences. The assignee is authorized, by the terms of the assignment, to "sell and dispose of the property assigned, either at public or private sale, to such person or persons, at such price or prices, and on such terms and conditions, *and either for cash or credit*, as in his judgment may appear best, and most for the interest of the parties concerned; and to convert the same into money, and to collect the debts, &c. On the 27th of February, 1850, the Dutchess County Iron Company recovered a judgment against Williams, for \$508.32, upon a debt contracted before the assignment. Upon which judgment an exe-

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cution was issued on the 28th of February, to the sheriff of the proper county, and returned unsatisfied. On the 28th of March 1850, an order was made by one of the justices of the Supreme Court, pursuant to the provisions of the Code relating to proceedings supplementary to execution, requiring the judgment debtor to appear and answer before a referee, appointed for that purpose, on the 30th of the same month. On the 4th of April following, the same judge made an order appointing the plaintiff a receiver of the property of the judgment debtor, and also, by order, forbade a transfer or other disposition of the property of the judgment debtor, not exempt from execution, or any interference therewith. On the 30th of March, 1850, Williams executed and delivered to Clark an instrument, whereby, after reciting that doubts had arisen whether by the assignment of the 5th of January, the assignee had the power to sell the property assigned *on credit*, and that it was intended to have it sold *for cash* only, the assignee was authorized and directed to sell the property for cash only. No assignment was ever executed by the judgment debtor to the receiver. It is admitted that immediately upon the execution of the assignment the assignee took possession of the assigned property; that he had in fact sold only for cash, and that he had applied a part of the moneys received by him as assignee to the payment of the preferred debts. On the 11th of April, 1850, another execution was issued upon the judgment to the sheriff of Columbia, and Samuel Bryan, who owed the judgment debtor \$191.50, at the time of the assignment, paid the debt to the sheriff to apply upon the execution. The assignee claims that he is entitled to receive this debt under the assignment. The cause was heard upon the pleadings. Some of the facts above stated do not appear in the pleadings, but were admitted by counsel upon the argument.

E. P. Cowles for plaintiff.

M. Pechtel for defendants.

HARRIS, Justice.—A preliminary objection has been made to the right of the plaintiff to maintain this action. It is insisted that, even though the assignment from Williams to Clark should be declared void, the plaintiff has acquired no right to the property, because no assignment has been made to him by the judgment debtor. But I do not understand that an assignment to the receiver is necessary to pass the title of the judgment debtor. Under the former practice the filing of a creditor's bill, and the service of process, created a lien upon equitable assets, but not upon property liable to execution. The commencement of a suit to reach equitable assets had the same effect in creating a lien, as a levy upon personal property by virtue of an execution. Notwithstanding such bill, another creditor might issue execution, and take the property of the debtor subject to levy. This might be done until an order had been made for the appointment of a receiver. From that time the property was deemed to be in the custody of the court, and could not be taken in execution

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When under such an order a receiver had been appointed, and had perfected his appointment, by giving the requisite security, he became, by virtue of his office, legally entitled to the possession of the debtor's property. It is true, that it was usual to require the judgment debtor to execute an assignment, but it was never held that such an assignment was necessary to divest his title. It never was supposed that, because the judgment debtor had absconded, or was otherwise beyond the reach of process, so that an assignment could not be enforced, the creditor was without remedy. On the contrary, the receiver acquired his right to take the property from the order for his appointment and not from the assignment (2 Barb. Ch. Pr. 168-9). An order for the appointment of a receiver is an equitable sequestration (*Albany City Bank v. Schermerhorn*, 9 Paige 377). Neither the order for his appointment, nor even an assignment to the receiver pursuant to such order, would divest the debtor's title to his real estate (*Chautauque County Bank v. White*, 6 Barb. 589). The receiver became entitled to the rents and income, but the title could only be divested by sale upon execution.

The Code is silent as to the time when the judgment creditor shall be deemed to have acquired a lien upon his debtor's equitable effects; but I think the order for his examination, made under the 292d section, should be construed to give the creditor the same lien which he acquired under the former practice, by the commencement of a suit by creditor's bill. So, too, the order that the debtor's property should be applied towards the satisfaction of the creditor's judgment, made pursuant to the 297th section, and the order appointing a receiver pursuant to the 298th section, have the effect of themselves, and without an assignment by the debtor, to divest his title, and to vest it in the receiver. The order under the 297th section places the property under the control of the court, and the order under the next section creates an officer to take charge of it (see *Monell's Pr.* 364). If this be so, it follows that the attempt by the judgment debtor to give validity to the assignment of the 5th of January by the instrument executed on the 30th of March, was ineffectual, as the debtor could do nothing to divest the lien which his creditor had acquired by obtaining an order for his examination on the 28th of March.

But as there is another suit pending between the same parties, which differs from this only in the fact that the order for the examination of the debtor was made after the 30th of March, it may be well to consider here the effect of the instrument, executed on that day, upon such a case. This question is only important upon the supposition that the assignment of the 5th of January contains provisions that would render it void as against creditors. Assuming that this is so, is there anything in the instrument of the 30th of March which can give validity to that assignment? I think not. Had the assignment reserved to the judgment debtor a specific benefit, as the payment of a sum of money out of the proceeds of the assigned estate, I will not say that a release of such benefit, before proceedings should be instituted to avoid the assignment,

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might save it from being declared void. But even in such a case, the question would not be free from difficulty. Here the assignment prescribes certain terms and conditions by which the assignee is to be governed in the execution of his trust. Among these is one which, it is alleged, renders the assignment void as against creditors. The validity of the assignment, as against the assignor, cannot be questioned. Finding the assignment is likely to be questioned, the assignor subsequently executes another instrument by which he assumes to vary the terms of the assignment. Had he the power to do so? Could he revoke the authority to sell on credit, any more than he could the authority to sell at all? I think not. He had divested himself of all power to control the disposition of the property assigned when he executed and delivered the assignment. Whether that assignment is valid or not, as against creditors, must depend upon its own provisions, and not upon anything done subsequently by the assignor, or even by the assignee.

The remaining question in the case has been judicially determined against the defendants in *Griffin v. Barney* (2 Comst. 385). In that case, an insolvent debtor had conveyed all his property to trustees for the benefit of certain creditors. The trustees were authorized to sell the property assigned "at public or private sale, for cash or upon credit," &c. This was held to be an unanswerable objection to the assignment. A trustee has no right to sell property assigned to him for the benefit of creditors *upon credit*, and if the debtor undertakes to confer upon him this power, the conveyance is void. The debtor may give a preference among his creditors, but he can only do it by an *unconditional* devotion of his property to the immediate payment of his debts. If the assignment contain any other terms or conditions, or if it confers any other power or authority upon the trustee, it is void.

The plaintiff is therefore entitled to a judgment declaring the assignment void as against him, with directions for taking an account substantially the same as in *Wakeman v. Grover* (4 Paige, 43). The judgment may also provide for the payment of the plaintiff's costs out of the funds in the hands of the assignee.

In the Common Pleas.

[September Special Term, 1851.]

Before the Honorable D. P. INGRAHAM, First Judge.

JAMES W. BARKER *against* JACOB W. DILLON.

MOTION TO VACATE ORDER OF ARREST.

It is too late to move to vacate an order of arrest after justification of bail.

Motion to vacate order of arrest,—the facts sufficiently appear in the opinion of the Court.

N. Y. Common Pleas—Harrison and others v. Newton and others.

Geo. S. Still for defendant.

J. T. Doyle for plaintiff.

INGRAHAM, J.:—This motion is to vacate an order of arrest upon which the defendant was arrested in March, 1850. Since that time bail has been put in, and have become perfected by not being excepted to. Judgment has been obtained, and the bail have been sued, and after such suit the defendant has been surrendered by his bail, and is now in custody.

I am clearly of opinion that the defendant is too late in his motion. By the code, the motion may be made at any time before the bail justify. This was the rule under the old practice; but it never was supposed to mean that it could be made after the bail was perfected and no justification necessary. Then, as now, I understand the rule to mean that the motion may be made at any time before the security which the bail furnish is accepted by the plaintiff, whether by omitting to except or by a justification. But, even supposing the other view is correct, still the defendant in this case, by his long acquiescence in the order of arrest, is too late to make the motion. He has delayed eighteen months—suffered judgment to be obtained, and his bail to be sued, and then surrendered himself in discharge of bail. I cannot imagine a case in which acquiescence in a proceeding can be more fully shown.

It is hardly necessary to add that if the letters produced by the plaintiff were written by the defendant, there is no ground for asking to have the order discharged, but as the motion must be denied upon the grounds above stated, it is unnecessary to discuss the merits of the motion. *Motion denied.*

[*Same Term.*]

JAMES HARRISON, GEORGE HARRISON, HENRY SUYDAM, JR., ALMET REID, and DANIEL R. SUYDAM, *against* ISAAC NEWTON, DANIEL DREW, and SETH KELLY.

INJUNCTION.

Where it appears that a building, in the course of erection, can be completed without increasing the injury to the plaintiff, of which he complains, and that it would be productive of serious injury to continue the injunction, the same will be dissolved.

If the building was clearly a nuisance, the use of it should be prohibited as well as the erection of it. But if the right of defendant to erect the same is a matter only of doubt, it is not proper in the first instance to stay his proceeding in the work by injunction.

A temporary injunction by order in this case was obtained, restraining the defendants from proceeding with the erection of a certain wooden building and fence now in a course of erection upon the building between Cortlandt and Liberty streets, in the city of

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New York, and from erecting any other building or fence in the place thereof, at or on the wharf or bulkhead.

Application was now made to continue the injunction.

The material facts appear in the opinion of the Court.

A. T. Smith for the plaintiffs.

Cowles and Jones for the defendants.

INGRAHAM, J.:—The defendants were restrained by a temporary injunction from finishing a wooden building in the course of erection on the bulkhead, between Cortlandt and Liberty streets. It is stated by the defendants, that this building is completed externally excepting a portion of one end, and hanging the doors, &c. This is not denied on the part of the plaintiff. Upon the argument of this motion to make such injunction perpetual, it occurred to me that there was no reason why the defendants should be enjoined from completing the building. That all the injury the plaintiffs could sustain from its erection would be sustained by them from its present condition as fully as if the building was entirely completed, while, on the other hand, to continue the injunction would cause loss and injury to the defendants. Under such a view of the case, there could be no propriety in preventing the completion of the building in its present form; subsequent reflection has strengthened the opinion I expressed on the argument. If it was clearly a nuisance erected without a semblance of right, or if its use would be productive of injury to the plaintiffs, it would be proper to examine the other questions involved in this motion; but where such is conceded not to be the case, and the only benefit to result from the injunction would be to deprive the defendants in the meantime of the use of the building, I cannot see any propriety in its continuance. In *Osborn v. Taylor*, 5 Paige, 315, the chancellor says: "A preliminary injunction should not be granted unless it is necessary to protect some right or interest of the complainant's which may be injured, impaired, or endangered, by the proceedings of the defendant in the meantime, as it frequently turns out upon the hearing, that the sole object was to embarrass the defendant's proceedings and thus compel a compromise."

Where it is apparent that no such effects can be produced as will in any way cause injury to the plaintiff, from infringing the injunction, it ought not to be continued.

I concede that if the building were clearly a nuisance or purpessure, and was injurious to the neighborhood, it would be as proper to prevent the use as the erection of it. But that point is involved in great difficulty in this case. The same use has been made of these premises for a number of years as is now intended. Besides, the owners of the pier, &c., have an act of the legislature, authorizing them to erect buildings for their business, and the maxim "*qui facit per alium facit per se*," may with propriety be applied to them. Where there is so much doubt upon the merits of this controversy,

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and no injury can result to the plaintiffs from denying motion, this and where the public accommodation is to some extent involved in the controversy, my opinion is that this motion should be denied.

There are also other reasons suggested to my mind against this motion, upon the merits, but as the argument was not concluded on that branch of the motion, I forbear expressing any opinion upon them until after the hearing of the case.

This motion is denied and the temporary injunction dissolved, defendants' costs \$10, to abide the event.

[*Same Term.*]

MATTHIAS B. WARD, SURVIVOR, &C., APPELLANT, *against* JAMES SYME,
WILLIAM WORDSWORTH AND MICHAEL J. MASON, RESPONDENTS.

LIEN—COSTS—MOTION TO VACATE SATISFACTION PIECE.

By the provisions of the code, costs are given to the party and not to the attorney, except where it is a matter of stipulation.

Motion to vacate satisfaction piece given by William Wordsworth, an attorney of this court, for costs received by him, as respondent, in an appeal from this Court to the Court of Appeals, on the ground that Mr. Coren has a lien on the costs as Wordsworth's attorney, and that Wordsworth could not satisfy them. The original suit was commenced on the 7th June, 1848, before the code came into operation, but the appeal on which the costs in question were recovered, was not taken until the 14th August, 1849, after the code came into operation.

The appellant died 1st August, 1850, and the present motion is made against his executors by Coren as the attorney for Wordsworth, which Wordsworth repudiates.

F. H. Bryan, for Coren.

E. C. Gray, contra.

INGRAHAM, J.—As the law existed before the adoption of the code, this motion should be granted. The same rule would apply to this case as was applied to the original judgment in this court on the former motion. Under the code, however, a different rule, I think, must prevail. The appeal was brought after the passage of the code, and was subject to the provisions contained in it. Such has already been decided when the costs were taxed at the rates fixed in the code. By the code the costs are given to the party and not to the attorney; all laws regulating the fees of attorneys are abolished, and the attorney is left to make his own agreement with his client. I am at a loss to see upon what ground it can be held that the attorney is entitled to the costs as his. He may agree with

N. Y. Common Pleas—*LaWall v. Grigg.*

his client to charge the costs, or more or less, but without some agreement so made, the costs, I think, are solely the property of the party and not the attorney. If this be so, then it follows, conclusively, that a mere notice from the attorney to the opposite party can never give a title in these costs to the attorney. He may give a notice that he claims the costs or has a lien on the costs, and, if he really has such lien, that notice would protect him; but, before the court can vacate a satisfaction piece executed by the party, under such a notice, it must also appear that by some agreement between the attorney and his client, he has actually become the owner of such costs, and, thereby, is entitled to collect them without such an agreement.

I cannot see how the title of the party given to him by statute in the costs, can be transferred to another.

If the attorney can thus, by a mere notice, obtain the costs in the cases, he may in the same way claim the allowance made for unreasonably defending a cause, which is also awarded as costs, and which cannot for a moment be considered as a compensation to the attorney.

As there is nothing in the papers to show that the attorney has any other right to this judgment, except merely as attorney on record, the motion must be denied.

As this question has not before been decided in this court, no costs are granted to either party.

New York General Term, October, 1850.

LA WALL against GRIGG.

The mode of reviewing reports of referees upon the whole issues, in causes referred before the Code, (the report made afterwards,) is by motion, at special term, to set aside the report agreeable to the requirements of the 44th Rule of 1847, and the former practice.

This suit was pending when the Code was enacted, and was referred agreeable to the former practice. In May, 1850, the referees reported in favor of the defendant, and judgment was perfected thereon on the 21st May. On the 5th of June, and within the thirty days provided by the Code, the plaintiff gave notice of an appeal to the general term, and filed an undertaking. The papers did not disclose whether the appeal was on questions of law or of fact, though on the argument, it was averred that the latter were involved.

Treadwell, for Defendant, moves to set aside the appeal.

Pinckney, contra.

By the Court, EDMONDS, J.—The mode of reviewing the report of referees in a suit at law, pending when the Code of Practice went into effect, is in conformity with the former practice, namely, by a motion to set aside the report, conducted agreeably to the rules

U. S. Circuit and District Courts—The late Levi B. Woodbury.

adopted by the court in July, 1847. Section 272 of the Code, which provides for an appeal or rehearing, is not made applicable to old suits; and section 6 of the act supplementary to the Code, which also gives an appeal, is applicable only to suits in equity, pending when the act took effect. The present 24th rule of court is not applicable to such a case, but the 92d rule is, and that declares that all actions pending on the 12th of April, 1848, may be conducted according to the rules adopted in July, 1847.

Even section 278 of the Code, which requires the judgment to be entered in the first instance on the decision of a single judge, is not made applicable to such a case as this; but our 30th rule, defining what are enumerated or non-enumerated motions, classes this motion among the latter, and ordains that it be heard at a special term.

The practice adopted in this case, then, is wrong. An appeal does not lie, but the mode of review, it being a suit pending when the Code took effect, is by a motion to set aside the report of the referees agreeable to the requirements of the 44th Law Rule of 1847, which motion must be heard in the first instance at a special term, under the 30th rule.

The counsel have doubtless been misled by the general nature of the language used in the present 24th rule, and he has misapprehended the purport of it.

It is so general in its terms as to convey the idea that in all cases where the whole issues have been referred, the case must be brought on to a hearing at a general term. But it is to be taken in subordination to the enactments of the statute, and section 348 of the Code allows only questions of law to be taken before the general term for review, so that the language of the 24th rule, which directs that the case shall be reheard only on appeal at a general term, is necessarily confined to cases which raise questions of law. Where a review is sought upon questions of fact, that part of the rule is not applicable.

I repeat, however, that that rule has nothing to do with this case. The new mode of reviewing reports of referees by appeal of rehearing, not having been made applicable to prior existing suits, the appeal in this case was wrong, and it must be dismissed, but without costs and without prejudice to a motion to set the report aside.

THE LATE LEVI B. WOODBURY.

It is with feelings of deep regret we announce the death of LEVI B. WOODBURY, one of the Assistant Justices of the Supreme Court of the United States. On the 11th of September, on the Court assembling at the Circuit Court of the United States for the Southern District of New-York, the two learned Judges who preside there, with several distinguished members of the bar, gave expression to the feeling entertained for the eminent Jurist, which we give in detail.

Mr. J. Prescott Hall, United States District Attorney, rose and said:—

May it please your Honors—It has been the practice of this court, when a

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distinguished man, connected with the administration of justice under the supreme authority of the nation, has been called forever from the scene of his usefulness, to pay some tribute to his memory. It is a custom marked by strict propriety; nor should it be honored by the members of our profession in its breach rather than in its observance. An occasion of this nature now arrests our attention, in the tidings which have recently been borne to our unwilling ears, of the sudden, the unanticipated death of Judge Levi Woodbury, of the Supreme Court of the United States. He has gone from us in the midst of his usefulness—in the fulness of his career—and in the time of his utmost judicial employment. Such an event may well be deemed, in some degree, a national calamity. It is especially solemn to those who belong to the same class in the great industrial family of mankind. After a life not full of years, but full of honors, Judge Woodbury has gone down to the grave—too soon for the bench of which he was a distinguished ornament, and too soon for the country whose devoted son he was. It is not for me to sketch his character, or pronounce his eulogy. These will be done by abler hands and more eloquent lips than mine. But I may, perhaps, be permitted to say, that this sudden dispensation has fallen upon me as an individual, with more than ordinary impressiveness. It is probable that my personal intercourse with the illustrious deceased was more recent than that of any member of the bar, now in the presence of the Court. But few days have passed—a mere thread of time has intervened, since I had the privilege of welcoming Judge Woodbury to the retired shades of my own house—to sit by him at my own board, and to enjoy, in company with others, the rich treasures of his conversation and varied knowledge. (Here the learned gentleman was deeply affected.) I little thought, then, that ere the seasons should roll round—before the veil of coming events could be lifted from the scenes of busy life—that it would become my melancholy duty to speak of Judge Woodbury as of one who had passed away forever, and who could leave nothing to us but the fruits of his acquirement, and the bright example of his industry, his integrity and fame. The loss which has fallen upon us, is a bereavement common to all—to the Judges upon the bench, to the bar who appear in their presence, and the community to which we belong. A distinguished jurist has fallen in our forensic halls—an able man has been cut down in the maturity of his strength—a Judge, learned and upright, has passed beyond those earthly tribunals where his judgments were displayed, and we, who are now assembled here, stand up in this presence, to bear our willing, but inadequate testimony, to the memory of the man, the lawyer and the judge. Under these melancholy circumstances, I am directed by the bar now assembled here to present to the courts now in session here, both Circuit and District, a series of resolutions expressive of their opinions as to the merits of the distinguished dead, with a wish that the same may be entered upon their records, in perpetual remembrance of this solemn event.

Mr. Hall then read the following resolutions, which had been adopted at a meeting of the bar for presentation to the courts :—

Resolved, That the bar of this court have heard with the deepest regret the announcement of the death of the Hon. Levi Woodbury, one of the Associate Justices of the Supreme Court of the United States of America.

Resolved, That his long public services, and the faithful discharge of the duties of the high offices he has filled, entitle him to the grateful memory of his countrymen, and that his patient research, his extensive learning and impartial judgment, entitle him especially to the remembrance of the bar, and to an honorable place among the jurists of our country.

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Resolved, That the Attorney of the United States for the Southern District of New York, be requested to present these resolutions to the Circuit Court at its opening to-morrow, and to move the court that the same be entered on its minutes.

Resolved, That a copy of these resolutions, attested by the Chairman and Secretaries, be transmitted by them to the family of the late Judge Woodbury, with the sincere condolence of the members of this meeting.

The Hon. B. F. Butler then addressed the Court :—

I ask leave, may it please your Honors, to add a few words to what has been so appropriately said by my learned brother. In the death of Judge Woodbury, the national judiciary, the legal profession, and the whole country, have indeed sustained a severe loss. Though one of the last appointed of the Judges of the Supreme Court, his judicial labors had acquired for him the high respect of the bar of his own Circuit, and the confidence and esteem of the nation. This fact, especially when we consider that for the twenty years immediately preceding his accession to the Bench, he had been withdrawn from professional duties, and that he took the place of a Judge pre-eminent in judicial learning—is one of mark, and deserves more than a passing notice. Its sufficient explanation will be given by a brief reference to the personal character and public career of Judge Woodbury. To great professional ambition he united, in a large measure, many valuable practical qualities—excellent common sense—perfect integrity—admirable method in business—great temperance, simplicity and frugality in his personal habits—and untiring perseverance. With these qualities, success at the bar was certain; public confidence and professional preferment as naturally followed. Accordingly, at an early age, he was appointed a Judge, and shortly afterward, Chief Justice of the Supreme Court of his native State. His published opinions, while a member of that court, made him favorably known to the profession in other States, as well as to his brethren at home, as a sound lawyer, a learned and discriminating Judge. And though he was soon withdrawn from judicial life, first by his election, as Governor, and then by two elections as Senator in Congress, with ten years intermediate service in the Navy and Treasury Departments, he never forgot his vocation as a lawyer, and never entirely gave up his professional studies. The reason is obvious. Our governments—state and national—are governments of laws. This is emphatically true of the federal government, which finds, in written organic law, the sources and the measure of all its powers. The discussions of the Senate frequently involve grave questions of public and constitutional law. On all such occasions, Judge Woodbury showed the legal extent and value of his judicial attainments. But nowhere is extensive and accurate legal instruction more necessary or useful than in the great executive departments—for it is their very business to aid the President in taking care that the laws be faithfully executed. In his administrative career, Judge Woodbury always exhibited an anxious desire to meet and to fulfil this obligation. To this end he studied the acts of Congress, with which he had to deal, in the spirit of a sound lawyer; and he applied to the questions constantly arising on them, the principles and habits of the judicial function. In this way, he kept up a familiar acquaintance with the elementary rules of legal science, and acquired a very comprehensive and exact knowledge of the legislation of Congress, and especially of our commercial and revenue systems—titles of great extent, and commanding importance in all places, and particularly in the federal courts. Judge Woodbury also displayed, in the ordinary routine of his administrative duties, in each of

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the departments over which he presided, many qualities very useful in a Judge—equanimity of temper—commendable caution—urbanity of manners and strict impartiality. In cases of difficulty he did not decide upon his course until after thorough inquiry and mature consideration. As might be expected, the conclusions to which his mind was deliberately brought, were held by him with firmness and tenacity. No wonder, then, that with so many preparatives for the judicial office from which he has just been taken, he should have filled it with signal ability. The reports of the Supreme Court as well as those of his own Circuit, contain many enduring memorials of his diligence, his learning, his conscientious sense of justice. In any view of Judge Woodbury's public career, however limited or special, we cannot overlook his services as a statesman. This, indeed, is not the fit time or place to speak of the measures he proposed or the policy he supported in that character. I shall, therefore, not even allude to them. But as I was, for several years, intimately associated with him, while in the Executive Departments, I may be permitted, even here, to testify to the unsurpassed faithfulness and zeal with which he devoted himself to his official duties. In the Treasury Department, especially, his labors were immense. He came into that Department in the midst of great fiscal difficulties. The difficulties, or others still more aggravated, continued to exist during the seven years he was at its head. To grapple with them, to keep them in check, to maintain, in spite of them, the credit of the Department, required unremitted and self-denying efforts. These efforts he made, and he made them cheerfully. He seldom or never left the seat of government. He superintended, so far as any one man could do it, every bureau in his Department. He was usually the first officer at his post, and the last to leave it. He performed more physical labor than almost any other man in the public employ. And, yet, by the methodical distribution of his time, and by doing everything in its season, he seemed never to be hurried; and with all his engagements, he found more leisure for the enjoyments of domestic life and of society, into which he entered with kindly relish, than most of his associates. Besides the numerous and elaborate reports demanded by the regular duties of his office, he made laborious researches into matters connected with the national industry, commerce and resources. Some of these documents are of permanent value, and will well repay the study of the statesman. In this connexion, his essay on cotton, published in 1836, may be particularly mentioned, as the most complete and valuable collection of facts connected with the history of that important staple, which had at that time appeared in print. The loss of such a Judge, even after the longest period of service, would be felt as a public calamity. It affects us the more painfully, occurring at an hour so unexpected, and at a period when, to human appearance, several years of increased usefulness might naturally have been looked for. The disease by which Judge Woodbury was snatched away was so sudden and so rapid, that the public announcement of his danger barely preceded the tidings of his death. It is impossible that any one—especially that any one to whom he was familiarly known—should contemplate, unimpressed, such an instance of the uncertainty of life, and the vanity of human expectations. Nor can we forget, that in proportion to the suddenness of the blow is the severity with which it has fallen on those intimately allied to the lamented dead. The resolutions of the Bar now presented, will, I doubt not, be responded to by the profession generally, as due to the occasion. I trust, therefore, that the motion which has been made will be granted.

Judge Nelson, on behalf of himself and his associate, Judge Betts, responded as follows: The court very sincerely unite with the bar in the testimony of

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respect presented on this melancholy occasion, to the memory of our deceased brother, and cordially concur in the opinions expressed of the high character and many eminent qualities that distinguished him through a long life of public service. During this period, he held several of the highest offices of the government, and, in all of them, discharged the duties with very great ability. Notwithstanding these public employments had virtually withdrawn him from our profession for a period of some twenty years, his professional pride and enthusiasm never left him; and during the intervals of public office that afforded him an opportunity to practice the law, he returned to it, looking to the profession, always, as the foundation of his fame, and the source of an honorable support for himself and family. Although he had earned an enviable reputation in the councils of the nation, and one that might have satisfied high aims and ambition, yet, on his elevation to the bench of the Supreme Court of the United States, he entered upon the discharge of its duties with all the ardor and devotion of the youthful aspirant for its honors and renown—an ardor and devotion worthy of all praise and imitation.

All his professional zeal and enthusiasm revived, and with it the stores of legal knowledge which he had treasured up by the industry and learning of his earlier years. He was truly an able and most pains-taking judge—patient, if possible, to a fault, in listening to the arguments and authorities of counsel; and, what is of equal, if not higher merit, indefatigable in weighing the arguments, and searching out the authorities referred to, so that counsel might be sure the client would have the benefit of them in the investigations and judgment of the court. No judge ever lent a more willing ear to the labors and learning of the bar, in the examination of their cases; or more highly appreciated the value of both, as lights in guiding and directing the judgment, and in diminishing the labors of the court; or could have been more deeply impressed with the truth that the learning, as well as the fame, of the bench and of the bar, in the field of professional labor, are so intimately connected and blended together—so necessarily dependent upon each other for mutual support and durable existence—acting and reacting upon each other—that the fame of the one must rise or sink with that of the other; and that the usefulness as well as fame of each, rests upon common efforts and common ardor in the discharge of their respective duties, and upon the mutual respect for, and confidence in, each other. The judicial labors of our deceased brother and friend, are matters of public record, and need no commendation from us. The resolutions of the bar afford the best evidence that they are justly appreciated. They are the proper judges of them, and arbiters of judicial merit; and before which tribunal every judicial functionary must come, and his rank and standing, be it high or low, irrevocably determined. The private virtues and worth of the deceased were as exalted as his public character. Remarkable for the kindness of his disposition and amiability of temper, his intercourse with his brethren of the bench and bar was most agreeable and pleasant. Ever ready to extend courtesy and respect where it was due, and especially guarded, at all times, against uttering an offensive word that might wound the feelings of an associate, he was a model in this respect for all his professional brethren. Though we bow in submission to the inscrutable decrees of an all-wise Providence, we cannot but deplore the loss of our deceased brother as a great public loss to the bench, of whom he was one of its brightest ornaments, and to the country, of which he was one of its most enlightened and valuable citizens. We shall direct the resolutions of the bar to be entered upon the minutes of the court, and a copy to be transmitted to the family of the deceased.

Upon the conclusion of Judge Nelson's remarks, Judge Betts addressed the

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VOL. IX.]

NEW-YORK, NOVEMBER, 1851.

[MONTHLY PART]

H. S. District Court.

(Southern District of New York.)

IN ADMIRALTY.

Before the Honorable **SAMUEL R. BETTS**, District Judge.

WILLIAM S. POOLE AND OTHERS v. THE SCHOONER WASHINGTON.

LOTHROP L. STURGES AND OTHERS v. THE BARK MAZEPPA.

COLLISION.

In Admiralty pleadings the Court requires that material facts within the knowledge of the parties should be distinctly stated, and a neglect in this respect is to be taken most unfavorably against the vessel omitting it.

The general rule, that a vessel free meeting one close-hauled, must give way, whether the close-hauled be on the larboard or starboard tack, applies in all cases where the facts are not doubtful as to how each vessel has the wind.

During a dark night or under circumstances making it doubtful which vessel has the wind free, the larboard tack must give way in time, the starboard tack being regarded as privileged, although it may turn out that she had the wind some points free.

Where a practice was set up and a proof given, that on board vessels, more especially coasting schooners, no look-out was stationed exclusively to perform that duty when leaving the port of New-York during daylight, but that all hands were on deck and were considered as sufficiently performing that duty among them.

Held, such practice to be without law or reason, and that no practice can be more hazardous and reprehensible—that it is most preeminently and imperatively the duty of all vessels on leaving this port, at all times to observe the precaution of a vigilant look-out.

Held, that the want of a look-out detailed and stationed for the exclusive performance of that duty, was itself a circumstance of a strong condemnatory character, and exacted, from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered was in no way ascribable to her misconduct in that particular.

The facts sufficiently appear in the opinion of the court.

Robert Emmet and W. Q. Morton, for the Mazeppa.

F. B. Cutting and E. H. Owen, for the Washington.

1851. **BETTS**, District Judge.—It is evident that the controversy brought before the court in ~~the present~~ *this* was re-
important in itself, and also as affordi^{ng} ~~ing~~ *grounds*

U. S. Circuit and District Courts—The late Levi B. Woodbury.

bar in the following terms: The appropriate and impressive remarks of the presiding judge, in accepting the resolutions just offered by the bar, and ordering them to be recorded in the Circuit Court, express the sentiments of both members of the court in respect to the character and worth of Judge Woodbury. It would not be becoming in me to attempt to add to the effect of what has been so well said in the name of that court. But as the resolutions read and the observations with which they have been presented, look to the separate action of the District Court, in receiving and recording them, and as that court is also open for the purpose, I deem it not improper, as presiding magistrate therein, to offer a few words more, particularly applicable to the relation of that court and its judge and the distinguished deceased, than to the connection of the judge of this court with him. I became acquainted with Judge Woodbury in December, 1829, he then being in the Senate, and under circumstances favoring a great degree of intimacy between us on professional and general topics. The acquaintance continued during his life, although with but occasional opportunities of personal intercourse. Still, whilst he presided over the treasury department—a period in which the District Court was largely occupied with revenue cases and questions falling within the supervision of that department—I had occasion to know much of his thorough and pains-taking labors in that branch of the public service, and his very careful attention to matters touching our commercial interests and regulations, and the management and disbursement of the public revenues. From these circumstances, I feel entitled to say that all the public acts of Judge Woodbury in that relation, were marked by the most patient research and exact knowledge of the legislation and usages, domestic and foreign, affecting the trade and navigation of the country. His decisions and instructions upon these subjects were characterized by great soundness of judgment and fitness and propriety as practical guides and directions. The habit of his mind was eminently practical. This is also manifested in his judicial decisions, and in those varied labors with which he tasked himself for the furtherance of knowledge and the promotion of the well-being of society. To that end he devoted much time to the preparation and delivery of public addresses and lectures, in addition to the measureless toils expended in his official duties, whereon he thought his voice or example might have a useful influence. I comply most readily with the desire expressed by the bar, and direct the testimonials now offered to the memory of this great judge and good man, to be made part of the records of the United States District Court.

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The facts sufficiently appear in the opinion of the court.

Robert Emmet and W. Q. Morton, for the Mazeppa.

F. B. Cutting and E. H. Owen, for the Washington.

April 9, 1851. **BETTS**, District Judge.—It is evident that the subject of controversy brought before the court in these suits was regarded as important in itself, and also as affording strong grounds

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of claim to each of the parties, as cross actions were instituted nearly simultaneously and have been both pursued with great earnestness to a final decision.

The schooner *Washington*, on a voyage from New-York to Alexandria and Georgetown, District of Columbia, and the barque *Mazeppa*, from New Orleans to New-York, in the afternoon of September 15, 1848, came in collision, twenty or twenty-five miles southwardly of Sandy Hook, and some miles off the Jersey shore.

The day was bright and clear, and no object intervened to embarrass the movements of the vessels, or intercept a distinct view of each other.

Both received serious injuries from the collision.

The *Mazeppa* lost her foretopmast backstay; was cut down a little farther aft within two feet of the water, which washed in; had her mainmast shattered by the bowsprit of the *Washington*; was nearly stripped of her starboard bulwarks from aft of the fore-shrouds; starboard main-shrouds carried away; poop deck lifted up; cabin injured; stern boat knocked away; and from the tottering and dangerous condition of her mainmast it had to be cut adrift. Her anchors were let go at once; a pilot boat rendered salvage service; and the *Mazeppa* was towed to the city on the following day by a steamboat.

Libels were filed against the *Mazeppa*, for salvage on behalf of the pilot and steamboat, and the sums paid on their settlement claimed as part of the damages against the *Washington*.

The *Washington* had her bowsprit broken short off; lost her figurehead, and was otherwise seriously injured about the bows; she continued her voyage, however, to Georgetown.

The owners of the *Mazeppa* filed their libel against the *Washington*, on the 30th of September, to which an answer was interposed on the 9th of November following.

On the 16th of the same month the owners of the *Washington* commenced their action against the *Mazeppa*, and the answer to that libel was filed the 5th of December thereafter.

The cross actions were brought to hearing at the same time upon the double pleadings, and proofs taken in them conjointly.

The owners of the *Mazeppa* pleaded that she was close-hauled on the larboard tack, the wind *W.N.W.*, inclining to the *N.*, and blowing a whole-sail breeze; and that the *Washington* headed *S.S.W.*, being to leeward of the *Mazeppa*, with all sails set, and running at least four points free, the wind abaft the beam, at the rate of nine knots the hour, struck the *Mazeppa* on her starboard and lee side abaft the fore-chains, and charges the damages incurred to be \$10,000, besides salvage paid, &c.

They charge that the collision took place three to five miles off shore in full daylight, and was occasioned by the negligence and want of skill of those navigating the *Washington*, and the want of a proper and vigilant look-out on board her, and aver it was impossible for the *Mazeppa* to have done anything after her danger was discovered to avoid the *Washington*; that those on board the *Mazeppa*

expected the Washington, in obedience to the rules of navigation, would have taken seasonable measures to avoid the Mazeppa.

The owners of the Washington pleaded, that the Washington was sailing along the land about one and a half mile off, as near thereto as was prudent or customary for vessels of her size and draught of water to go; steering by the compass S. by W. or thereabouts, the wind blowing a fresh breeze from W. with frequent squalls, in which it would vary a point or two; that she was under whole mainsail and foresail, standing and flying-jib and no other sail, and the mainsail and foresail were about a point off from being close-hauled, and she was going about seven knots.

They charge that the weather was clear, so that objects could be seen at a great distance, and that the Mazeppa was to leeward and ran across the track of the Washington, the collision occurring between 3 and 4 o'clock P. M., and that it was impossible for the Washington to avoid it; the Washington did not any way change her course previously, and that the Mazeppa, by luffing or keeping away in time, could easily have avoided the collision, and charges the want of proper care and diligence in the master and look-out; the look-out not giving the pilot notice of the Washington till the two vessels were close upon each other, and allege the collision was occasioned solely by the fault of those on board the Mazeppa; and state the damages received by the Washington at \$3,000 and more. They aver the master, his mate and three men were on deck and kept a proper look-out, and such as is usual to keep in the day-time in fair weather.

The counter-pleadings introduce a multitude of particulars with a view to show the blame of the misfortune was imputable to the adverse vessel, but they consist rather of amplifications and inferences than allegations of any substantial points for proof or decision, and belong more to the province of argument than that of pleading. So far as they may be regarded as having a material bearing upon the merits of the case, they are noticed in the course of the decision, and it is unnecessary to spread them further on the statement of the case.

The material issues involved in these pleadings are, whether a proper look-out was stationed and kept on both vessels or either:

Whether both vessels were close-hauled upon the wind, or if either, and which, had the wind free, and to this inquiry, whether the wind was W. directly off shore, or W.N. W., inclining more N.:

Which vessel was to leeward as the two were approaching each other:

What was done or omitted on board either vessel immediately preceding the collision evincing the want of due precaution and skill.

Upon these several points the statements in the pleadings are directly in conflict, each vessel representing itself in each particular, wholly in the right, and the other one wholly in the wrong.

The pleadings on each side are sufficiently full and precise, except that the Mazeppa fails to aver the course she was steering.

The testimony adduced by her shows she was laying N. half E., but both in the libel and answer filed on her part, this particular is left

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unstated; it is only alleged, she lay close-hauled to the wind, blowing from *W.N.W.* tending more *N.*

On the other hand, the *Washington* sets forth distinctly in the pleadings her course by the compass. This is the proper method of pleading. The court has a right to an unreserved and explicit statement on the pleadings of every fact known to the parties, which may be material to the maintenance of the case set up by them respectively, and it is thus not unfrequently enabled, upon the mutual representation of the positions and manœuvres of the two vessels, to ascertain whether the conduct of either was blameable, and if so, with which the fault lies.

The neglect to supply this guide to the judgment of the court is always to be taken most unfavorably against the vessel omitting it, and the court will be cautious that such reserve shall not be used in her behalf to the surprise of her adversary, or so as to permit proofs to be shaped to meet any description of case she may find it advisable to set up on the trial. This point is not without materiality; for it is denied, on the part of the *Washington*, that the *Mazeppa* was holding a proper course, if she was in fact running close-hauled, and it was accordingly proper that she should have made a specific averment on that head, which should announce the ground of her justification and enable the *Washington* to meet it with the appropriate pleading and proofs, and the court be supplied a direct issue to decide upon. But as no exception was taken by the pleadings or in the course of the trial to this defect in the allegations of the *Mazeppa*, and as testimony was produced against her tending to show she was steering *W.* of *N.*, I think it may be allowable and proper for the court to consider the evidence on both sides to this fact, although it is not formally put in issue by the pleadings.

Some of the issues raised present no questions important to the merits of the case. For instance, it is not shown to be of any consequence to the rights of either vessel, whether the collision occurred 20 or 25 miles south of Sandy Hook, or $1\frac{1}{2}$ or 5 miles off the shore; for the evidence, so far as it applies to those inquiries, tends to show that at the time, the wind was the same at all those points.

It may occasionally happen that a current of wind runs up or down along shore, which is not felt in the same direction some miles from land, and that a change of wind is experienced soonest five miles nearest to the point at which it settles; but the clear bearing of the evidence in this case is, that during the period embraced within the transaction in question, the wind was felt from the same quarter at all the different places set up by the parties as the point of collision.

The disagreement in the proofs to be settled by the Court relates, therefore, solely to the question whether it blew directly from the *W.*, or from *W.N.W.* inclining *N.*, because all the witnesses in a position to speak to this fact at the time of the collision, limit their testimony to the course of the wind then and there blowing. The chief discordance arises from varying estimates of distance from other places, in which the two vessels came in contact.

U. S. District Court—Lothrop L. Sturges and others v. the Bark Mazeppa.

The maritime rule of law applicable to sailing vessels, meeting under the circumstances stated in the pleadings, is differently understood by the counsel for the respective parties.

For the Washington, it is contended, that the vessel running close-hauled with her starboard tacks on board, is entitled to hold her course when there is sea room sufficient, against another approaching her in a direct line, or on a parallel line so near as to endanger a collision, and that in either of such cases, the vessel on the adverse course must give way, and they insist that the privilege is preserved to the starboard tack, although running free. The authorities referred to do not support the proposition in so general a form as it is put and maintained by the argument.

Angell on Carriers, § 654, gives the summary of the doctrine as he gathers it from the cases, and he annexes to the principle the important qualification that the starboard tack so situated retains her course in *doubtful circumstances*.

The case from which the proposition is extracted affords very little countenance to any idea that the old rule was intended to be changed, by extending the privilege of the starboard tack beyond what had been always recognized in the established usages of navigation. In that case the vessels met in the night time, and it stood doubtful upon the pleadings and proofs which had the wind, and it appeared they were standing towards each other head and head, or nearly so, and that when the starboard tack ported her helm to avoid the other, the larboard tack ported hers also; thus bearing up again into the same track with the other. There were here a duplication of faults by the larboard tack: first, as it was unknown which vessel had the wind most free, it was her duty to have given way to the starboard tack; and second, after the starboard tack had adopted that measure herself, and had taken a course which would have carried the two clear of each other, the larboard tack bore up in the same direction, thus producing the collision which could have been avoided had she held her course, or done what was, in *doubtful circumstances*, incumbent on her, kept away (2 W. Rob., 189. *The Ann and Mary*).

That case, moreover, must always be followed with great caution, as in a suit at law for the very collision, a verdict and judgment had been rendered against the owners of the vessel on the starboard tack, fixing the blame on her.

The comments of the Trinity Masters appended to the case, and not adopted in its decision, can have very little weight in proof of the usage or customary rule of navigation, because the testimony of other Trinity Masters, offered to prove the usage to be otherwise, was rejected by the Court; and if their remarks were intended to cover the case of vessels running free or nearly so, they will be found in conflict with the general course of decisions in that Court.

The observations of the Trinity Masters most probably were meant to apply to vessels beating against the wind.

The case of the *Traveller*, also cited on the part of the Washington, brings out more distinctly than the *Ann and Mary* the doctrine

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alluded to in the terms employed by the Court in pronouncing its opinion, for it is declared the duty of the larboard tack to give way at once when there is a probability of a collision; and this it seems she must do, although the starboard tack is a point or two free, and as much to leeward (2 W. Rob., 197). The qualification of *peculiar circumstances* is, however, applied most distinctly to the doctrine, for in that case the vessels met in the *night time*, and each insisted her position was to the windward of the other. The course of the wind, and her own direction as claimed by each vessel, would put her close-hauled. They were running in opposite directions, one alleged she was steering S. with the wind W.S.W.; the other, that she was going in a north-westerly course, the wind being W. by N. to W.N.W. The larboard tack was accordingly placed in a situation, when in the night time, it was incumbent on her to take seasonable precautions against the chance of an encounter with the vessel approaching her.

This review of the special grounds upon which the decisions in the *Ann and Mary* and the *Traveller* were placed, relieves the cases of what might at first seem to be a conflict with the doctrines declared by the same Court in previous judgments, and which had been adopted and approved extensively in the Courts of the United States.

From the time of the decision of the *Woodrop Syms* by Sir Wm. Scott, (2 Dods, 83,) to that in the two cases referred to, the rule in relation to sailing vessels has been uniform, that the one running with the wind free must take measures to get out of the way of one approaching close-hauled on the wind, and this without regard to the fact whether the close-hauled vessel is on the starboard or larboard tack; and this is the rule of the Trinity House Corporation. (Abbott, 234, 235; Angell on Carriers, § 652; 3 Hagg, 316; *The Chester*, *ibid*, 221; *The Celt*; Westminster Review, Sept. 1844, p. 60.)

So in the American books, it is said, a vessel sailing with the wind free must give way to one sailing on the wind; the privilege of the starboard tack applying where both vessels are beating to windward, and are crossing each other in opposite directions, and there is the least doubt of their going clear. (Story on Bailments, § 611; 1 Conkling Ad. Pr., 305, Dana; Seamen's Friend, 84, 186.)

The rule recommends itself to a strict observance from its precision and simplicity, and because in the day time, it can rarely happen, when reasonable diligence is exercised, that both vessels will not readily discover their duty and privilege under it.

The rule does not, in terms, apply so strictly to vessels approaching, but not crossing each other with the wind free to each, for in that case, the law of navigation requires each to pass to the larboard of the other. (Trinity Rules, No. 2.) Yet the general law when one of the approaching vessels has the wind fair, imposes on her the duty to give way to the other on a wind. (Trinity Rules, No. 1.)

The facts in proof brought within these principles of law evince

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the fault to have been with the Washington, because if it appeared doubtful at the time on board her, whether the Mazeppa was not running free with the wind abeam, it was incumbent on her, being herself so situated, to have put her helm a-lee, leaving the Mazeppa an opportunity to pass on her larboard side; and, even if she was close-hauled, as is contended in her behalf, she had, in my judgment, no privilege to maintain her course in *the day time* against the Mazeppa, also close-hauled, for both should in such case port their helms passing larboard and larboard, as upon her theory, neither vessel was beating, and they were not crossing each other. (Westminster Review, Sept., 1844, No. 164, p. 60; Abbott, 235; 1 Law Rep., 313; *The Portland*; 2 W. Rob., 216; *The London Packet*.) And she might be required to give way from a privileged tack, when by so doing she could avoid a collision which was likely to occur from the larboard tack adhering to her course. (1 Eng. Law and Eq. R., 670; *The Lady Anne*.)

This view of the case necessarily defeats the claim of the Washington to damages, if it does not subject her to them, as her action cannot be maintained if she is guilty of any fault tending to produce the collision.

The mere fault of the Mazeppa, provided it be shown she committed one, will not entitle the Washington to recover damages. There must be, on her part, due precaution, skill and diligence, so that the injury could be no way justly imputable to her own misconduct. The action is founded upon the alleged correctness of her own conduct and the blameableness of the Mazeppa, and there must be affirmative proof supporting such posture of the case.

Again, upon the pleadings, there would be difficulty in the Washington maintaining a right to hold her course as a privileged tack. In the *London Packet*, (2 W. Rob., 216,) Dr. Lushington interprets the rule of larboard and starboard tack to depend upon the presumption that the two vessels are directly opposing each other, and is not intended to apply where the heads of the respective vessels are lying in different directions. Such he asserts to be the case when one heads to the S.E., and the other is N.N.W. half W. It is obvious the courses differed only one and a half point from a coincident line. In the present case, the course of one vessel was N. half E., and of the other, S. W., which would be the same deviation of a point and a half from coincident lines.

The distinction is plain enough, perhaps, upon the compass or in nautical arithmetic, but must be admitted an exceedingly close one for practical purposes, and does not seem to comport with the acknowledged law of navigation, which gives the privilege to the starboard tack close-hauled, against the larboard close-hauled, when the vessels are crossing each others' courses; and would, moreover, seem not entirely accurate in its postulates, because the courses given must, if sufficiently protracted, cross each other.

The same result is, however, obtained, whether Dr. Lushington's expression of the rule be adopted, or the more simple and perspicuous one, of each vessel putting her helm a-port when the courses

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are upon or approximating to a common line, because in both instances the vessels give way, each passing to the larboard of the other.

In my opinion, a great preponderance of the testimony derived from witnesses not on board either vessel, and in situations to see and know the facts as to the direction of the wind, and the courses the vessels were steering, and their distance off the land, supports the case made by the *Mazeppa*, and contradicts that set up on the part of the *Washington*.

It is satisfactorily proved that the two vessels were more than three miles from the Jersey shore at the time of the collision, and that there was no impediment in the way of their free navigation.

The atmosphere was clear, and the wind a whole-sail breeze. To the main particular in dispute between the parties, whether the wind was *W.*, or to the *N. of W.*, and about *N.N.W.*, inclining still more to the *N.*, the mate of the *Washington*, the man at her helm, and a deck hand testify it was *W.* The master and mate of another vessel, one and a half or two miles off, and running the same course with the *Washington*, and the master of a schooner, three miles off, going *N.*, also support that testimony. The captain of the *Washington* was not examined in the cause. On the other hand, the pilot, master, chief mate and five of the crew of the *Mazeppa*, including the man at the helm, all unite in asserting the wind was *N. of W.*, and in this they are supported by two pilots who passed these vessels about the time of the collision, in charge of other vessels coming to New-York, and by three other pilots who were in their pilot boat following the *Washington* down, and about a quarter of a mile from her at the time of the collision.

The bearing of the testimony of the witnesses out of the *Mazeppa* tends to fix the wind at about *W.N.W.* to *N.W.*

Their testimony furthermore corroborates that of the crew of the *Mazeppa*, that she was close-hauled and to windward of the *Washington*, and that the latter was running free, as were all the vessels in sight at the time going *S.*

This evidence overbears in numbers and disinterestedness that which represents the *Washington* close-hauled and to windward of the *Mazeppa* at the time.

There would be no utility in extracting from the proofs the evidence in all its details. Every witness was subjected to the most careful and skilful examination by the counsel for the parties, and was led through the most minute statement of particulars directly or collaterally bearing upon the case. I did not at the trial discern, nor on more studying the evidence now, do I find reason for distrusting the intelligence and integrity of the witnesses.

The discordance in their testimony is no doubt the result of misapprehension and mistake, but there is no reason disclosed upon the proofs which calls upon the Court to adopt the statement of the lesser number, and reject that of the great majority of these witnesses. Accordingly, I feel bound to regard the facts testified in support of the *Mazeppa*, as presenting the true statement of the

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case in this particular, and that she was to the windward close-hauled, and the Washington to leeward running two or three points free at the time of the collision.

This condition of things imposed on the Washington the obligation of proving that, notwithstanding her effort to keep out of the way of the Mazeppa, the fault of the latter had produced the injury sustained by her.

The Mazeppa is charged with misconduct in not keeping a sufficient look-out, so as to be apprised of the situation of the Washington, and be able to take proper measures for avoiding her.

This charge is supported by the evidence of Mr. Lothrop, a port warden, who testifies that about the time the Mazeppa came into port, he heard her captain and mate say, they did not see the Washington until she was within ten feet of the Mazeppa.

The captain denies he made such declaration, and says, he was called out of his cabin by the hail of the mate to the pilot, that a vessel was on the lee-bow, and as he came on deck he saw the Washington, then about ten lengths off.

The mate had been examined on depositions out of court, previous to the trial, and was not present to be recalled after the testimony of Mr. Lothrop was given.

He had sworn, he was placed forward as look-out, and had seen the Washington a distance off and had given the pilot notice of her, but it was supposed her then position and course would carry her entirely to leeward and clear of the Mazeppa.

There is evidence tending to show that Mr. Lothrop had evinced a strong partizanship in the cause in favor of the owners of the Washington, and under that feeling had made charges derogatory to the character of the pilots examined as witnesses, and the court, under such a state of his mind, should exercise caution in allowing his recollection of casual remarks of the captain and mate, to impeach their express and positive declarations on oath.

This topic need not, however, be discussed at length. It is enough to say, that Mr. Lothrop may have easily and innocently understood the assertion of the captain, that when he saw the Washington she was not more than ten lengths off, to be a distance of ten feet, and that she was then seen for the first time, and that kind of inconsistency, resting upon the memory of a mere word, could never be allowed in a Court of Justice to outweigh or discredit the direct and positive oath of a witness, to a fact passing under his own eyes.

I accordingly hold it proved that the mate was on the look-out, and saw the Washington a sufficient distance off to enable the Mazeppa to avoid her, if it was her duty to do so, and that he and the pilot acted under the persuasion that the Washington was running a course, and at a distance off, which left the Mazeppa out of danger.

On the other hand, it is admitted on the part of the Washington, that she had no individual of the crew designated and stationed forward as a look-out, and that the Mazeppa was not seen until within two lengths but it is asserted that the whole ship's company performed the duty of keeping a look-out.

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Evidence was given attempting to establish a usage with vessels leaving port, to rely upon the ship's company the first day out for that service, and not to detail and station any particular one or more to perform it.

Such practice, so far as it exists, is without warrant of law or reason. The duty of a ship's company the day she leaves port, will probably be as absorbing, or more so, than on any other day of the voyage, in fair weather. Much must inevitably be left unfinished, in clearing the deck, stowing luggage or loose cargo, arranging or coiling rigging, and various other services and necessities of the vessel, when she leaves her moorings, all which must be put in order by the crew as she goes out of port.

No practice can be more hazardous and reprehensible than to leave the ship to run her course amidst the incoming and outgoing navigation crowding a harbor like New-York, without the safeguard of a look-out properly stationed forward and assigned to that service, and instead of the first day being one on which she is exempt from employing that precaution, I hold it most preeminently and imperatively her duty to observe it with careful vigilance at all times.

The want of a look-out at such time, is of itself a circumstance of a strong condemnatory character, and exacts from the Washington clear and satisfactory proof that the misfortune encountered is in no way ascribable to her misconduct in that particular.

Without discussing at length the facts in proof on all the points at issue, or determining whether the *Mazeppa* is proved to have run suddenly into the wind and against the Washington, I hold, upon the law and evidence of the case, that there was wrong and fault causing the injury, and that they lie upon the Washington, and the *Mazeppa* is entitled to recover the damages sustained thereby, and the Washington must be condemned therefor with costs.

An order of reference will be taken to ascertain the amount of damages.

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[General Term.]

Before OAKLEY, Chief Justice, and DUER and PAINE, Justices.

EDWARD P. FRY *against* JAMES GORDON BENNETT.

LIBEL—PLEADING—DEMURRER.

Irrelevancy or surplusage is not a ground of demurrer to an answer which contains a denial of any material allegation in the complaint, or sets up a valid defence.

When a publication is libellous upon its face, the law implies that it was published with a malicious intent.

Malice in such cases is a conclusion of law which the plaintiff is not required to prove, nor the defendant permitted to deny.

It is only when the publication would be privileged, if not in fact malicious, that malice is necessary to be averred and proved.

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In other cases, the denial of malice forms an issue, which a jury has no right to determine, and which the court must, therefore, reject as immaterial.

Allegations in a complaint, relative to the intent and motives of a libellous publication, are not to be deemed material, so as to render it necessary for the defendant to admit or controvert them in his answer.

Only those allegations in a complaint are material, in the sense of the code, which the plaintiff must prove upon the trial in order to maintain his action.

An innuendo is not an averment of facts, but an inference of reasoning.

When improperly framed, it may in some cases justify a demurrer, but its truth or falsehood is never a question of fact for the consideration of a jury.

The sole office of an innuendo, is explanation, and the only question which it raises is, whether the explanation given is a legitimate deduction from the premises stated, and this question it belongs to the court alone to determine.

The decision of the supreme court in *Van Vechten v. Hopkins*, settled the law in this state, that "from the nature and use of an innuendo, it is not the subject of proof by witnesses."

Held that the issues taken in the answer of the defendant upon the truth of the innuendoes in the complaint were immaterial.

The code has made an important change in the rules of pleading in actions for libel or slander, in not requiring extrinsic facts, showing the application of the words to the plaintiff, to be stated in the complaint.

But extrinsic facts, when the proof is necessary to determine the meaning of the words, as libellous or slanderous, must still be stated in the complaint.

The code has only abolished those rules of pleading which are technical and formal, and arose chiefly from an arbitrary classification of actions.

These rules which, as founded in good sense and sound logic, lend an important aid in the investigation of truth, it has been careful to retain.

Of these rules none is more evidently just or better established than that which declares, "That where a defamatory charge is made in general terms, it can only be justified by a specification of the facts which are relied on to establish its truth."

An answer is insufficient in the sense of the code, and therefore bad upon demurrer, not only when it sets up a defence groundless in law, but when in the mode of stating a defence, otherwise valid, it violates the essential rules of pleading.

Held, that as the defamatory charges in each libel, set forth in the complaint, were general, the averments in the answer that the facts stated in each publication "were and are true," as a justification were insufficient.

An averment in an answer that certain facts are true, "as the defendant has been informed and believes," is to be construed as an averment "upon information and belief" of the existence of the facts, in all cases, where the existence of the facts is necessary to be proved to constitute a defence.

Whether a publication, libellous on its face, may be excused as privileged, is a question of law that may be properly raised by a demurrer.

A publication cannot be excused as privileged upon the ground that its animadversions were a fair and legitimate criticism, unless the truth of the facts upon which these animadversions were founded is established or admitted.

In all such cases the defences of truth and privilege are inseparable; and when that of truth is not pleaded, that of privilege must, of necessity, be rejected.

Held, that as the publications set forth in the complaint were not justified, and asserted facts and imputed designs, which rendered them libellous, the defence of privilege could not be sustained.

A demurrer may properly include matter in mitigation of damages, when the truth of a libel is not sufficiently pleaded.

It is not necessary that a demurrer should cover issues taken in an answer upon matters of inducement merely.

When circumstances in mitigation are meant to be given in evidence, they must be stated as such in the answer; otherwise, the plaintiff will have a right to infer that they are meant to be relied on as a bar, and upon that ground may justly demur to them.

Held that plaintiff was entitled to judgment upon all the demurrers, with usual liberty to amend upon payment of costs given to defendant.

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THIS was an action brought by the plaintiff, as manager of an Italian Opera Company, against the defendant, as editor and proprietor of the New-York Herald.

The defendant interposed an answer to each libel (twelve in number), and to each of these answers the plaintiff demurred, and also interposed a thirteenth demurrer to the conclusion of the answer.

As the question on the demurrers to each libel was substantially the same, the opinion of the court is given upon the first libel answer and demurrer, which thus decided the whole case. The facts sufficiently appear in the opinion of the court. The pleadings were under the code, and the cause was argued at General Term, on appeal from the decision at Special Term.

The court gave judgment for the plaintiff on all the demurrers.

Edward Sandford, John Van Buren, and B. Galbraith, for the appellants, made and argued the following points :

I. There is but one complaint and one answer, and there can be but *one* demurrer. The plaintiff is in error, therefore, in having interposed thirteen demurrers, and must elect to proceed on one only.

II. A demurrer must be either to the whole answer, or to one or more of the several defences set up in the answer. It cannot be to part of a defence. *Cobb v. Frazee*, 3 Code Rep. 43.

Neither one nor all of the demurrers together can be regarded as a demurrer to the entire answer.

Neither of the demurrers is a demurrer to the entire answer to one count or division of the complaint.

The inducement is referred to and must be considered as relating to each count of the complaint, and the denial of the inducement must be considered as relating to each answer to each count.

III. A demurrer bad in part is bad altogether.

Each demurrer proposes to be a demurrer to the whole answer to each count. It is not ; and it is, therefore, bad.

If a demurrer to the whole answer—some part of the answer is good—and, therefore, the demurrer is bad.

IV. A demurrer can only be interposed for insufficiency.

The demurrers, nor either of them, anywhere allege or show that the answer, or any part, is insufficient.

V. An answer cannot be demurred to for being immaterial.

The plaintiff alleges as a ground for each one of his demurrers that the answer and each part of it is immaterial. *Smith v. Greening*, 2 Sand. S. C. R., 702.

VI. A demurrer to an answer must state the grounds thereof. Code s. 153.

a Saying that the matters are badly pleaded, or that the statements in the answer are bad pleading, is not stating the grounds of the insufficiency. 1 Ch. Pl. 706.

VII. When an answer contains irrelevant or redundant matter, or its allegations are so indefinite or uncertain that the precise nature of the defence cannot be ascertained, the plaintiff's remedy is by motion. Code s. 160. *Smith v. Greening*, 2 Sand S. C. R. 702.

The judgment appealed from is erroneous.

VIII. It is not true, as stated in the judgment, that in not one of the answers is there a distinct positive averment of the truth of the charges contained in the particular libels. See folios 106, 107, 150, 161, 171 to 184, 189, 255.

IX. The court had no authority to decide that the defence of privilege was groundless, or that the alleged libels went beyond the limits of fair and legitimate criticism. That was matter of fact for a jury.

Ambiguity forms no ground for a demurrer.

The grounds of demurrer in the thirteenth demurrer are not sufficient.

The demurrers not covering the whole answer, judgment for the plaintiff on the whole issue is improper.

X. The court, at the Special Term, wholly mistook the character and office of the insertion of the words "informed and believes," in the answer. The complaint being sworn to, the answer had to be verified, and these words were inserted in the pleading merely in reference to the brief form prescribed for its verification. They do not qualify, in any manner, the legal effect of the matter so alleged as a pleading, nor tender any issue as to the fact whether the defendant had such information and belief.

The qualification has reference solely to the verification.

XI. The judgment, at the Special Term, should be reversed, and judgment be given to the defendant on the demurrers, with liberty to plaintiff to reply, on payment of costs.

F. R. Sherman made and argued the following points :

I. None of the libels are legal or privileged communications. *Dibden v. Swan*, 1 Esp. R. 28. *Kenyon J.*, "The editor of a public newspaper may fairly and candidly comment on any place of public entertainment; but it must be done fairly, and without malice or view to injure or prejudice the proprietor in the minds of the public. That if so done, however severe the censure, the justice of it secures the editor from legal animadversion: but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, that such is a libel, and, therefore, actionable." Also, *Thomas v. Crosswell*, 7 J. R. 264.

There is a class of cases which are called legal or privileged communications, such as applications to the Legislature, petitions to proper authorities to redress grievances, giving the character of a servant, or the credit and standing of a merchant on a proper occasion—but this case falls amongst neither of these classes.

II. The truth or justification is not well pleaded.

I. On the ground that no specific facts are alleged to support it. *Jansen v. Stewart*, 1 T. R. 753; *Van Ness v. Hamilton*, 19 J. R. 349; *Cooper v. Greely*, 1 Denio, 364; *Jones v. Stevens*, 11 Price Ex. R. 235; *Stiles v. Nokes*, 7 East, R. 506.

II. That under the code a general averment, repeating over the libel, and averring it to be true, on information and belief, or that

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all the facts therein contained are true on information and belief, is insufficient. The code allows only the truth to be pleaded in bar. The justification must be as broad as the charge. The law is not changed, in this respect, by the code. Sec. 142.

De Crespigny v. Wellesley, 5 Bing. R. 393; 15 C. L. R. 477, 478; Best Ch. J. If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the character of any persons they might be supposed to calumniate. There will be no difficulty in getting wretches who would be better off within the walls of a prison than they are without, to furnish such as will pay for them, with any statements they may desire, respecting the character of any persons whatever."

In reference to charges left to the inference of the reader, instead of being directly made, Van Buren, Senator, in the case of *Spencer v. Southwick*, 11 Johns R. 593, says: "Such a doctrine (referring to the doctrine of its being allowed as a defence); added to the acknowledged licentiousness of the press, would form a rampart from behind which the blackest scurrility and the most odious criminalations might be hurled on private character with impunity, and would, indeed, render the press both a public and private curse, instead of a public blessing."

Lewis v. Clement, 3 Barn & Ald. 702. Libel by an editor of a newspaper on an attorney.

The libel began—"Shameful conduct of an Attorney!" The defendant pleaded that the account was a true account of proceedings in a court of law; and after verdict for the defendant, it was held, that the above words formed no part of the proceedings, and the plaintiff was entitled to judgment.

Libellous matter repeated over on information and belief, without disclosing the name of the author, or the source of information, and that it is entitled to credit, is not only no justification, but it is not even evidence or a circumstance in mitigation. *Wolcott v. Hall*, 6 Mass. R. 514; *Lane v. Hinman*, 1 Price Ex. R. 76; 2 Atk. R. 472.

In *Mapes v. Weeks*, 4 Wend. 659; *Inman v. Foster*, 8 Wend. 602; *Kennedy v. Gifford*, 19 Wend. 301, it was adjudged in New-York that evidence that the defendant had been told by another what he had uttered against the plaintiff was inadmissible, as well in mitigation of damages, as in bar of a recovery. (Starkie on Slander, p. 302 n) [340].

So, in England, suspicions and rumors of the guilt of a party to whom crime is imputed may be given in evidence in mitigation of damages. Here this doctrine has long since exploded. (Stark on Slander. Intro. p. 24.

III. The fact of publication being admitted, a traverse of motives and meaning is immaterial. The motives and meaning are apparent, as soon as the fact of publication is admitted. (*Astley v. Young*, 2 Bur. R. 812.)

IV. The matters set up in the answer, such as the whole article,

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might possibly be evidence at the trial, but are not material facts, pleadable on which issue could be joined. They are mere evidence of facts, at the most. (2 Ed. Ch. R. 211.)

V. The matters in each answer are in aggravation, not in mitigation of damages. They are merely re-libelling the plaintiff on the records of the court. (*Stiles v. Nokes*, 7 East 506.)

VI. A demurrer admits nothing except what is well pleaded. (*Jones v. Stevens*, 11 Price Ex. R. 235.)

VII. As to the last, (thirteenth demurrer,) the defendant cannot plead that the plaintiff was not damaged. (Russel's case, No. 161; *Dyer's R.* 26; 6 Comryn's Dig. Plead in actions of misfeasance, 2 L. P. 342.)

VIII. There should be final judgment for the plaintiff, and a writ of inquiry issue. The defendant ought not to be allowed to libel the plaintiff on the records of the court. (*Stiles v. Nokes*, 7 East 506; *Thomas v. Crosswell*, 7 J. R. 264; *Van Ness v. Hamilton*, 19 J. R. 349; *Patten v. Norris*, 10 Wend. 624.)

Besides, the defendant has had two opportunities to amend, and has thought proper not to do so.

The rights of the defendant cannot be prejudiced, because, if he has got any evidence in mitigation of damages, he can offer it on a writ of inquiry.

DUER, J.—The complaint and answer in this case, are, perhaps, as extraordinary pleadings as have ever been exhibited in a court of justice; and it would be the severest condemnation of the code that has yet been pronounced, were we forced to declare them its legitimate offspring. But this declaration we cannot make. The condemnation it implies would be glaringly unjust. These singular pleadings derive no sanction from the code. They are not only inconsistent with its general design, but directly at variance with many of its provisions. The object of the code is to reduce pleadings to the utmost simplicity that, in each case, the nature of the subject, and of the relief sought, will properly admit; and if the rule, which it clearly prescribes, that only those facts are to be stated which constitute the cause of action, or the substance of the defence, and which must be proved by the party alleging them, to entitle him to a judgment, shall be constantly observed, the simplicity that has been sought, and which is intimately connected with the discovery of truth, and the due administration of justice, will be certainly attained; nor will any cause of obscurity remain, except such as may arise from the imperfections of language, or the unskilful use of it by the pleader. (Vide the able opinion of Mr. Justice Harris, in *Williams v. Hayes*, 5 How. P. Rep., 492. The views of this learned judge exactly correspond with the observations in the text.)

It is the palpable and egregious violation of this elementary rule of the code, the true basis of the whole system, that has rendered the pleadings before us so voluminous and complex, that, instead of being "a plain and concise statement of the facts constituting the cause of action or the defence," (Code, secs. 142, 149,) they seem

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industriously framed to defy analysis and baffle comprehension. The complaint, however, is by no means liable to this censure in the same degree as the answer. It is, indeed, in no ordinary measure, prolix and verbose, containing numerous allegations and averments, that, with manifest advantage, as well as propriety, might have been omitted, but it is simple, lucid, and brief, compared with the perplexed, obscure, and almost interminable document which purports to be an answer, and which, with truth, and almost without a metaphor, may be described as "*Monstrum—informe, ingens, cui lumen ademptum*."

We shall, however, endeavor to extricate the questions of law that are necessary to be determined, from the mass of irrelevant matter in which they are involved; and, in proceeding to consider them, we may confine our attention to the answer to the first libel, since the objections to which this is liable, apply, with equal force, to all that follow. Although the twelve libels which are set forth in the complaint differ in the transactions to which they relate, and in the imputations which they convey, yet the answers to each resemble each other so entirely in their structure, that the causes of demurrer, which are assigned as applicable to each, are substantially the same, so that in pronouncing the sufficiency or insufficiency of a single demurrer, we shall in effect determine them all.

As the censure that we have passed on the answer considered as a whole, is applicable to each distinct portion of it, we do not doubt that a large proportion of the answer to the first libel would have been struck out on motion, as irrelevant or superfluous; but neither irrelevancy nor surplusage is a sufficient ground of demurrer. (*Smith v. Greenin*, 2 Sand., S. C. Rep., 702.) And hence, if those parts of this answer which are covered by the demurrer tender a plain issue, on any material allegation in the complaint, or set up a valid defence, the demurrer must be overruled; while, on the other hand, it must be allowed, if the issues which are formed are wholly immaterial, or the defences set up are insufficient in law.

It is alleged on the part of the defendant, that the answer has taken issue on material allegations in the bill in denying.

1st. The intent of the publication.

2d. The truth of the innuendoes. And that it sets up valid defences by averring:

1st. The truth of the facts stated in the libel; and

2d. That the libel is a fair criticism on the conduct of the plaintiff, as manager of the Italian Opera, and its publication therefore privileged.

We shall examine these positions in the order in which they have been stated:—

First, The denial of the intent of the publication, as charged in the complaint.

The publication set forth in what may be termed the first count of the complaint, we do not hesitate in saying, is libellous on its face, as imputing to the plaintiff dishonest practices and motives, and tending to expose him to public odium or contempt; and in all such

cases, the malicious intent of the publication is not a question of fact, but a conclusion of law. It is the intent which the law implies, and which the plaintiff is therefore not required to prove, nor the defendant permitted to deny. The law most wisely presumes, that every person endowed with reason, foresees and intends all the mischievous consequences that may justly be expected to flow from his voluntary acts, and the administration of justice, both criminal and civil, may be said to rest upon the solidity of this maxim, and the constant necessity of its observance. Hence, where the manifest tendency of a publication is to subject the person to whom it refers to public odium and reproach, the author or publisher cannot screen himself from responsibility by averring that he acted from a sense of duty to the public, and not from malice to the individual. Unless he can establish by evidence the truth of his statements, he must answer in damages for the injury which he has occasioned, and which, as he ought to have foreseen, he is presumed to have meditated. The absence of express malice—of malice in fact as distinguished from malice in law—may frequently operate to diminish the amount of damages, but can never be opposed as a bar to their recovery, except in that class of privileged communications in which express malice is necessary to be proved to render the defendant liable. The rules that have now been stated, we have been accustomed to regard as elementary. They are laid down by all the text writers, (1 Starkie on Slander, by Wendell, ch. 8, pp. 209 and 228; 1 Chitty Plead. 424; 2 Greenleaf on Evidence, p. 337, § 418,) and are declared or implied in numerous decisions. Without going through the cases, we deem it sufficient to refer to the judgment of the King's Bench, as delivered by Mr. Justice Bayley, in *Bromage v. Proser*, (4 Bar. and Cress, 252 and 258.) In the opinion of this learned judge, all the prior authorities are carefully examined, and the distinction which he deduces from them between malice in *law* and malice in *fact*, is not only lucidly explained, but vindicated by reasons of unanswerable force. It was an action of slander and the question, whether the words proved, which were plainly actionable, had been spoken *maliciously*, was upon the trial submitted by the judge to the determination of the jury as a question of fact, and the jury having found a verdict for the defendant, the case came before the court upon a motion for a new trial. The judges were all of opinion that the direction given to the jury was erroneous, upon the ground that in an ordinary case of slander, (not a case of privileged communication,) the law *implies* such malice as is necessary to maintain the action, and, consequently, that in such cases, it is the duty of the judge to withdraw the question of malice wholly from the consideration of the jury. It is hardly necessary to add, that a fact which a jury has no right to determine, cannot be put in issue by the pleadings.

The defendant, in this case, has not denied that the publication in question was made by him, "of and concerning the plaintiff," and his denial that it was made with the intent and motives set forth in the complaint, is either a denial that the publication is libellous at all, which is an objection that he could only raise by a demurrer ;

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or it is an attempt to submit to the jury, as a question of fact, the existence of the malice which the court is bound to infer. Hence, unless it shall hereafter appear that the denial of a malicious intent is connected with and forms a part of the defence of privilege, the issue which it forms must be rejected as immaterial.

It was strongly pressed upon the argument, that the defendant was under the necessity of traversing the allegations in the complaint relative to the intent of the publication, since these allegations, from their bearing upon the question of damages, ought to be regarded as material, and, consequently, that the defendant, by not denying them in his answer, would be precluded from contesting their truth upon the trial; but we have frequently decided, and until a different construction of the code shall be enforced upon us by a higher authority, must continue to decide, that only those allegations in a complaint are to be deemed material in the sense of the code, which the plaintiff *must prove upon the trial in order to maintain his action*. It is upon these only that an issue can properly be taken, and it is of these only that the truth is admitted by the omission in the answer of a specific denial. The allegations which relate to the intent and motives of the defendant may possibly be sustained by evidence upon the trial, and may thus operate to enhance the damages, but as none of them are necessary to be proved to entitle the plaintiff to recover, none were necessary to be inserted in the complaint; and, although they may not be liable to rejection as irrelevant, they may be justly treated as redundant and superfluous.

II. We proceed to the next inquiry, whether a valid issue is formed by the denial of the truth of the inuendoes?

The praise of ingenuity cannot be denied to the argument of the defendant's counsel upon this question, yet it involved, as it seemed to us, an entire misconception of the true meaning and office of an inuendo. An inuendo, so far from being an averment of facts upon which an issue can be taken, is not an averment of facts at all; it is merely an inference of reasoning from certain premises, and although, when improperly framed, it may in some cases tend to justify a demurrer, in none is its truth or falsehood a question for the consideration of a jury.

Mr. Starkie has very correctly defined an inuendo as "an explanation of the meaning of the words published or spoken by a reference to facts, previously ascertained by averment or otherwise." (1 Starkie by Wendell, pp. 418, 431.) As its sole office is explanation, it cannot introduce new matter, or enlarge, in any degree, the sense of the words to which it relates. If it enlarge the sense materially, which can only happen when the sense which it attributes to the words is that which alone renders them actionable, the proper course of the defendant is to demur, and if the court be of opinion that the inuendo is not justified by the antecedent facts to which it refers, and that rejecting it, the words are not actionable, it is certain that judgment will be rendered in his favor. But it is evident, that if the inuendo could be properly construed, as tendering an issue of facts, it would be the duty of the court, instead of rendering judg-

ment for the defendant, to overrule his demurrer, and compel him to plead. Where the words, although their sense may be enlarged by the inuendo, are plainly actionable upon their face, a denial of the truth of the inuendo would be frivolous and nugatory. As rejecting the inuendo, the cause of action would remain, the denial would be immaterial as an issue of fact, and groundless as an issue of law. And the same observations apply, when the explanation of the inuendo corresponds entirely with the unambiguous meaning of the words, or is a plain and necessary deduction from the facts previously averred. In brief, the question which an inuendo raises, is, in all cases, a question not of fact, but of logic. It is, simply, whether the explanation given is a legitimate conclusion from the premises stated; and to determine this question, must be, in all cases, the exclusive province of the court.

Hitherto, we have cited no authorities in support of these positions, nor do we deem it necessary to refer to any, except the learned treatise of Mr. Starkie, (1 Starkie, pp. 418, 432,) in which the English cases are collected and explained, and the judgment of our own Supreme Court in the early and leading case of *Van Vechten v. Hopkins*, (5 John. Reports, 211.) The opinion, in this case, of Mr. Justice Van Ness, with whom the majority of his brethren concurred, bears the impress of his clear and vigorous intellect, and is a signal proof of the skill and ability with which he could apply his powers in the conduct of a legal disquisition. The several offices of a prefatory averment, of the colloquium, and of the inuendo, are distinguished and defined with admirable precision and perfect accuracy, and the conclusion at which he arrives, that "from the nature and use of an inuendo, it is clear that it cannot be the subject of proof by witnesses," (p. 226,) which we are not aware has in any subsequent case been impeached or questioned, we think must be regarded in the courts of this state as *settled law*.

In closing this branch of the discussion, it seems expedient to notice an important change in the rules of pleading in actions for libel or slander, which has been introduced by the code. Formerly, in all cases in which the application of the words published or spoken was *uncertain*, or their *meaning* ambiguous, and their application to the plaintiff, or their meaning as libellous or slanderous, could only be determined by a reference to extrinsic facts, an averment in the declaration of the existence of these facts was indispensable; and it was in these cases only, that, strictly speaking, an inuendo was necessary.

But the code provides that, hereafter, "it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the words which are set forth as the cause of action, but it shall be sufficient to state generally, that they were published or spoken of and concerning the plaintiff." (Code, Sec. 164.) We have reason to know that this provision is construed by many as superseding the necessity of stating extrinsic facts in all cases whatever, but, in reality, it is carefully and very properly limited to the cases in which proof of extrinsic facts is ne-

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cessary to fix the application of the words, not to determine their meaning. Hence, where the meaning of the words is so ambiguous that extrinsic facts are necessary to be proved, to show them to be actionable at all, the necessity of stating these facts by an explicit averment is precisely the same as it has always been. As these facts must be proved to enable the plaintiff to maintain his suit, they are material and issuable in their nature, and a change in the rules of pleading that would have released the plaintiff from the obligation of stating them in the complaint, and thus have taken from the defendant the opportunity of controverting them in his answer, would have been highly inexpedient. Whether the change that has been made, limited as it is, was entirely judicious, may be seriously doubted.

III. Having arrived at the conclusion, that the answer in this case has failed to make an issue upon any material allegation in the complaint, we are next to inquire, whether it has set up a valid defence.

In order that our observations upon this question may be closely understood, it will be necessary to recite those passages in the answer, in which the defences of "truth and privilege," it is alleged, are contained. They form the concluding paragraphs in the first answer, and are repeated, with slight variations of expression, but with no change of meaning, in each that follows :

"And this defendant further says, that all the facts stated in said publication were and are true, as this defendant has been informed and believes, and all the opinions, deductions and inferences therein stated, were fair, reasonable, legitimate and legal deductions from such facts and circumstances, and that the grounds thereof were fairly made known to, and placed before the public, in connection therewith, and that said publication was lawful and privileged, as this defendant has also been informed and advised, and as he believes." (Printed case, p. 28, fol. 106.)

Our first observation upon these passages is, that they are so expressed as to render it difficult, if not impossible, to say whether truth and privilege were meant to be alleged as separate defences, or the defence meant to be relied on was not that of privilege alone. It is doubtful whether the defendant intended to say, that the facts being true, and the inferences therefrom fair and reasonable, the publication was therefore privileged; or that the facts were true, and also that, without reference to the truth or falsehood of the facts, the publication was privileged; and this uncertainty was held by the judge, from whose decision this appeal was taken, to be alone a fatal objection to the answer. Certainly, the code requires (Sec. 150,) that separate defences shall be separately stated, and the opinion of the judge at special term, that the blending together, in one statement, two defences, which in themselves are distinct and independent, is not an objection of form, but renders the answer under the code insufficient in law, seems to be fully sustained by that of the Supreme Court, in *Boyce v. Brown*, (7 Barb. S. C. Rep., p. 80.) We deem it unnecessary, however, to express any opinion as a court, upon the question whether an uncertainty, which results solely from

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an ambiguous form of expression, and which might have been removed by a proper motion at chambers, is alone a valid ground of demurrer, but shall adopt, for the purposes of this opinion, that construction of the answer upon which the counsel for the defendant have insisted, namely, that the defences of truth and privilege are separate in themselves, and are separately stated.

The allegation, that "the facts were and are true, as this defendant has been informed and believes," was construed by the judge below, as affirming only the information and belief of the party, not the truth of the facts, but although such is the obvious and natural interpretation of the words, we think that in pleadings under the code, they may reasonably be construed as an averment, *upon information and belief*, of the existence of the facts; and such is the construction that will hereafter be given to them in all cases in which the existence of the facts thus referred to is necessary to be proved to constitute a defence.

The sole question, therefore, in relation to the validity of this defence as pleaded, is, whether a general averment of the truth of the facts is a sufficient justification of the libel, which it certainly is not, if we are to be governed by the rules of pleading that were in force previously to the adoption of the code.

The code, in abolishing a division of actions, that was, in a measure, arbitrary, and all forms of pleading inconsistent with its own provisions, has been careful not to abolish those rules of a sound logic by which the sufficiency of pleadings is to be determined. (Code, Sec. 140.) Rules which were purely technical, and had a reference solely to the particular form of the action in which they were applied, are doubtless abolished; but those which, having their foundation in reason and good sense, lend an important aid in the investigation of truth, and manifestly tend to the furtherance of justice, retain all their original force and authority; and of these, none was more clearly established than that which declares that, when a defamatory charge is made in general terms, it can only be justified by a specification of the facts upon which the defendant relies to establish its truth. Where, for example, the charge is, that the plaintiff is a *swindler* or thief, a defendant who justifies, must set forth, with all requisite certainty of time, place and persons, the particular acts of fraud or felony which he intends to give in evidence in support of his accusation, and a mere repetition of the charge, or a simple averment of its truth, as constituting no defence, would entitle the plaintiff to judgment. The law is not so unreasonable as to expect that the plaintiff, in such a case, shall proceed to a trial prepared to explain and vindicate every action of his life; yet this he must be, unless the defendant shall be required to specify the acts which, in support of his defence, he intends to impeach. Nor, in requiring this, does the law impose any hardship upon the defendant. If, when the libel was published or slander uttered, he had no knowledge or information of any facts that could be given in evidence to establish its truth, he is without excuse, and is justly liable to the penalty of damages; and if he possesses the knowledge

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or information, there can be no difficulty in his stating the facts, which he believes to be true and expects to prove. (*J. Anson v. Stuart*, 1 T. R., 748; *Lane v. Howman*, Price, 76; *Morris v. Langdale*, 2 B. & P., 284; *Holmes v. Catesby*, 1 Taunt, 343; *Van Ness v. Hamilton*, 19 John., 368.)

It is evident, from these observations, that the rule in question cannot be regarded as technical and formal. On the contrary, as its object is to secure a fair trial between the parties, by preventing the injustice that may result from surprise, and such is its manifest tendency, the protection which it affords to a plaintiff is not only reasonable, but necessary. It is one of those rules for "determining the sufficiency of a pleading," which the frames of the code, so far from meaning to abolish, were solicitous to preserve; and we are clearly of opinion that it is the duty of judges to apply it, as hitherto it has been applied, to every case where the imputations upon the character of the plaintiff are conveyed in general terms, which, if true, may be shown to be so by evidence of the particular facts which, by implication, they assert. The libels set forth in this complaint are, as it seems to us, without an exception of this character, and that they are so, was very faintly denied upon the argument.

The libel which is the immediate subject of consideration alleges, in substance, that it was a part of the system of the plaintiff, as manager of the Italian Opera, to employ his critics in attacking, in corrupt and purchased newspapers, the females of his company, and the answer is, in our judgment, insufficient, in not stating the names of the critics thus employed, of the females attacked, and of the corrupted newspapers in which the attacks were published, the substance of the articles thus published, and the time and place of their publication. All these circumstances ought to have been known to the defendant before he published the libel, and if they were not, he took upon himself the risk, and must bear the consequences of its publication.

It has, however, been insisted that this objection to an answer, that the defence of truth is not set forth with all the particularity and certainty which the law requires, can no longer be raised by a demurrer. The insufficiency of an answer, which is now the only ground of a demurrer, it is asserted must be construed to mean the entire insufficiency in law of the defence which it alleges, and cannot therefore be said to exist when it is only the form of pleading a defence, and not its substance, that is erroneous or defective. That such, however, is not the true and reasonable construction of the code, we think may be rendered evident by a very brief examination of some of its provisions. The rules for "determining the sufficiency of pleadings" to which the code refers, and which, except as modified, it has been frequently and very properly decided, that it retains, are manifestly rules of pleading, and not of law. (Code, sec. 140; *Hill v. Thatcher*, 3 How., 497; *Knowles v. Gee*, 4 How., 319; *Rochester City Bank v. Suydam*, 5 How., 216; *Williams v. Hayes*, id., 472; *Boyce v. Brown*, 7 Barb., 80.) The authors of the code would have transcended their powers, had they attempted to alter

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the rules of law which determine the validity of a cause of action or of a defence—and, in truth, no such attempt has been made. Their labors have been strictly confined to procedure and pleading; and, as the only rules “for determining the sufficiency of pleadings” which they have modified, are rules of pleading, (Code, secs. 161, 162, 163,) it necessarily follows, that it is to *these alone* that section 140 must be construed to refer. Hence, when by the application of these rules, an answer is found to be insufficient, we cannot doubt that its insufficiency may be declared upon a demurrer; and this must be so, unless we suppose that “insufficiency” in the section which gives the demurrer, (sec. 153,) has a different meaning from that which it manifestly bears in the section which prescribes the rules by which the fact of insufficiency is to be ascertained—a supposition which we regard as gratuitous and unreasonable. The words of the section authorizing a demurrer for insufficiency, in requiring the grounds of the demurrer to be stated, lead to the same conclusion that the term “insufficiency” is used in its broadest legal sense, since, if there are no other grounds of demurrer than that the answer contains no denial of the cause of action, and sets up no defence valid in law, we can perceive no reason why any other than a general demurrer, averring that the answer is not sufficient in law to bar a recovery, should be required or allowed. We must, therefore, adhere to the opinion, that an answer is to be deemed insufficient in the sense of the code, not only where it sets up a defence which is groundless in law, but when in the mode of stating a defence, otherwise valid, it violates those primary and essential rules of pleading, which the code has studiously retained.

IV. As from the defective mode in which it is pleaded, the defence of the truth of the libels cannot be sustained, we shall proceed to consider whether their publication can be justified, or more properly excused, on the ground of privilege.

We understood the learned counsel for the defendant to contend that the question of privilege is in all cases a question of fact, which it belongs to a jury alone to determine, and if this be so, it is a necessary consequence, that a demurrer, which seeks to withdraw this question from the consideration of a jury, must be overruled. But, although in some cases, the claim of privilege is a mixed question of law and fact, that it is in all a question which it is the exclusive province of the jury to decide, is a position that we cannot hesitate to reject. It has no real support from any adjudged case—it attributes a dangerous power to the jury—it robs the court of its appropriate functions, and, in our judgment, if admitted to be true, would subvert the whole law of libel as it has hitherto been understood and administered. It could no longer be said with truth, that private reputation is at all under the protection of the law, should it be held, that in every case in which the defence of privilege is raised—and it may be raised in all—it is in the power of the jury, in the exercise of an arbitrary discretion, to grant or withhold the protection that is sought. We say, advisedly, “in the exercise of an arbitrary discretion,” for such is the discretion which is not restrained or limited by

rules of positive law, and, if the law has not defined the cases in which the claim of privilege may be justly admitted, the discretion of a jury, in allowing or rejecting the claim, is plainly unlimited and absolute. Such, however, is, assuredly, not the actual state of the law. On the contrary, the law has most carefully defined and distinguished the several classes of cases, in which alone a publication, libellous on its face, may be excused as privileged—(Starkie on Slander; *Cook v. Hill*, 3 Sand. S. C. R., p. 341)—and whether the case of a defendant, who in his answer sets up this defence upon his own statement of the facts, can be properly referred to any one of these classes, is the question which a demurrer to his answer of necessity raises, and which, when it is thus raised, the court is bound to determine.

It is this question, therefore, in its application to the present case, that we shall now examine.

The defendant, as the editor of a public journal, if not actuated by private malice, had an undoubted right to criticise and condemn the acts and conduct of the plaintiff, as manager of the Italian Opera, and if the plaintiff were, in fact, guilty of the various acts which the successive publications of the defendant impute to him, the animadversions upon his conduct, which those publications contain, are fully warranted, and the inference that he was unworthy of public confidence and support, was, in the language of the answer, a "just and legitimate deduction." But to render the critical animadversions of the defendant justifiable or pardonable, the truth of the facts upon which they were founded must be established or admitted; for, although the criticism may be just, upon the supposition that the facts are true, yet, if they are false, the imputations which they convey upon the character and motives of the plaintiff may be an aggravated libel, fully entitling him to the damages which he claims.

When an irreligious, immoral or licentious book is published, the editor who denounces its pernicious tendency, with such reflections upon the character and motives of the writer as the examination of the book fairly suggests, so far from deserving to be treated as a libeller, is entitled to the thanks and gratitude of the public. But if the work is published anonymously, and the editor, without evidence, imputes it to a person, say, a clergyman, of unblemished character, although the criticism upon the book itself may be perfectly just, none can doubt that the false imputation of its authorship is a malignant libel, demanding from a jury the infliction of exemplary damages.

Observations precisely similar apply to the present case. If the plaintiff had been in the habit of bribing newspaper editors and critics to defame the females of his company, and if, in a former season, he had cheated the subscribers to the opera, (which, if not directly asserted, is not obscurely intimated, in a subsequent libel,) the defendant may well be excused for inferring and predicting, that in the season then commenced, he would pursue a similar course of baseness and dishonesty. But, if the truth of the facts thus charged upon the plaintiff is not so alleged that it can be given in

evidence upon the trial, the publications in which they are contained, facts and comments, inferences and deductions, as well as statements, must of necessity be treated as malicious and serious libels, for which the defendant must answer in such damages, remunerative or penal, as a jury may deem to be adequate. In this, and in all cases in which a publication, libellous in its tendency, is sought to be excused as a just, and, therefore, privileged criticism, the defences of truth and privilege are inseparably connected, and, as in the present case, that of truth, we have shown, cannot be admitted, we have no alternative but to say, that of privilege must be equally rejected. The libels which are the subject of complaint do not consist in deductions and inferences from acknowledged facts, but in the assertion of facts, and the imputation of designs and motives which, unless the defendant, under corrected pleadings, shall prove to be true, he cannot be justified or excused for publishing.

Our conclusions are, that as the answers to the several libels contain no denial of any material allegation in the complaint, and set up no valid defence, the plaintiff must be entitled to judgment upon the demurrers, unless the demurrers themselves are essentially vicious, or the complaint radically defective.

There are only two of the objections that have been taken to the demurrers that we deem at all necessary to notice, and these are not easy to be reconciled. In truth, they seem to involve a plain contradiction, since the first is, in effect, that the demurrers are too *broad*, and the second, that they are too *narrow*. Still, as one, though not both, of these objections may be well founded, both must be considered.

The demurrer to the first answer, and the remark is applied to each that follows, is said to be too broad, as embracing, not only those parts of the answer to which our past observations have referred, but also those which allege facts and circumstances, which, although not amounting to a full defence, may properly be given in evidence, in mitigation of damages. The argument, however, that the demurrer is, for this reason, too extensive, we think is founded upon a very erroneous interpretation of the code. It is true, that section 165 permits matter in mitigation of damages to be set forth in the answer, but this is only allowed when the truth of the defamatory matter is properly averred; and as we have decided that in the present case the truth has not been sufficiently pleaded, it follows that the allegation of mitigating circumstances must also be rejected, and it is, therefore, properly comprehended in the demurrer. Nor is this all; we are clearly of opinion that when circumstances, which can only be given in evidence in mitigation of damages, are set forth in the answer, it must be distinctly stated that it is with that view, and for that purpose only, that they are introduced, since otherwise the plaintiff will have a right to infer that they are relied on as a bar to the action, and upon that ground may properly demur to them. This necessary distinction between matter in mitigation and matter in bar is not made in any one of the answers.

The demurrer is said to be too narrow, as not embracing those

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parts of the answer which contain a denial of the matters of inducement set forth in the complaint. The reply is, that as the matters of inducement, thus averred in the complaint, constitute no part of the cause of action, it was not necessary to traverse them in the answer. The issues thus formed must be regarded as immaterial, since the judgment to be finally rendered cannot depend upon their determination. If the answer had contained nothing more than a denial of the matter of inducement, it is clear that the plaintiff would have had an immediate right to demand a judgment, and the effect must be the same if the answer shall be reduced to that state by the allowance of the demurrers. The demurrers embrace all those portions of the answer which profess to contain, or can be construed as intended to contain, any defence to the action, and consequently, those portions which, as they contain no defence, create no obstacle to the judgment which the plaintiff asks, although, perhaps, they might have been included, are, with entire safety, omitted. The objections to the complaint will be disposed of in few words.

We do not at all doubt that, upon the argument of a demurrer, the defendant may attack the complaint, but the grounds of the attack, to render it successful, must be such as would have entitled the defendant to judgment, had he elected to demur instead of answering. The first objection in this case, that the complaint does not state facts sufficient to constitute a cause of action, is of this character, and would, indeed, be conclusive if well founded, but, as we are of opinion that each of the publications set forth in the complaint, is a libel upon its face, and that it is sufficiently averred that each was published of and concerning the plaintiff, the objection must be dismissed as untenable and groundless.

The other objections which, although stated in the printed points, were very faintly pressed upon the argument, are founded upon averments in the complaint, which may be justly regarded as redundant and immaterial, since they may all be struck out without affecting the causes of action, which are sufficiently stated, and upon which alone the plaintiff can be entitled to recover. As, upon a demurrer to the complaint, we could not have hesitated to give judgment for the plaintiff, all the objections now taken must be over-ruled.

Hitherto we have taken no notice of the thirteenth demurrer, and we regret that we are under the necessity of adverting to it at all. This demurrer is to the concluding portion of the answer, which purports to be a defence, not to a single libel, but to the entire action; but it is a defence which we cannot believe any counsel has seriously advised. It was doubtless intended as a jest, and was meant to operate as such upon the minds of the jury upon the trial, but although it might be excused if uttered by counsel in addressing the jury, we are forced to say that it ought never to have found a place in a pleading which forms a part of the records of the court, and, that upon a proper application, it must have been expunged for impertinence. This pretended defence is, in substance, that the plaintiff, so far from having sustained any injury, was, in fact,

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greatly benefitted by the publication of the series of libels, of which he unreasonably complains, and that the defendant, so far from being liable in damages, is entitled, as author and publisher of the libels, to a compensation for his work and labor, his valuable and meritorious services, and he actually prays that an account may be taken of damages and profits, and a balance be found and certified in his favor. The appropriate and necessary reply is suggested by the observations of Lord Denman, in the recent case of *Baylis v. Lawrence*, 11 Adolph and Ellis, 924.

It is, that although blame from some quarters is more valuable than praise, it is a mistake to suppose that those to whom the remark applies have acquired a right to libel others with impunity. The damages which, in such cases, are not required as compensatory, may yet be imposed, and justly imposed, as exemplary and vindictive.

The plaintiff is entitled to judgment upon all the demurrers, but the usual liberty is given to the defendant to amend his answer upon the payment of costs.

In the Common Pleas.

[October Special Term, 1851.]

IN EQUITY.

Before the Honorable LEWIS B. WOODRUFF.

HARRISON and others v. NEWTON and others.

INJUNCTION.

An injunction should not be granted to restrain or abate an erection as a nuisance, upon the complaint of a plaintiff who acquiesced in or encouraged such erection.

An injunction will not be granted to prevent an erection on the mere ground that it is a public nuisance, unless the evidence is quite clear that it will be more advantageous to the public that this be done. Nor on the ground that it is a purpresture merely, unless the interest of the people of the state in their collective capacity require it.

To sustain a bill on behalf of an individual, it is not enough that the erection is a public nuisance, or a purpresture merely; his right to file the bill depends upon the question, whether it is also injurious to him as an individual?

To warrant the granting of a preliminary injunction, the proof of injury ought to be very clear.

Where the right is doubtful, the court will not enjoin, unless it appear that the injury to the plaintiff will be irreparable.

The facts sufficiently appear in the opinion of the Court.

A. F. Smith, for plaintiff.

Cowles and Jones, for defendant.

WOODRUFF, J.—This is an application for an injunction *pendente lite*, under the following circumstances: the plaintiffs are owners and lessees of the buildings on the easterly side of West-street, between Cortlandt and Liberty streets in this city.

The defendants are members of an unincorporated association engaged in running a line of steamboats (called "The People's Line") from this city to Albany, and in the use and occupation as lessees of the wharf and bulkhead forming the westerly side of West-street, in front of the premises of the plaintiffs, and of the pier extending therefrom into the North river; and this association, known as The People's Line, composed in part of the same members as at present, have been in such use and occupation for more than sixteen years last past.

It appears from the affidavits submitted that for many years last, more than one-half in width of the pier referred to, at its junction with the westerly side of West-street, has been occupied by a building used as the office of the association, by which the entrance to or upon the pier was reduced or obstructed, and the passage of vehicles and carts with freight, passengers, &c., to and from the steamboats hindered, and that by the great increase of the business this hindrance became so great that at times, even the street adjacent thereto became obstructed by carts, carriages, &c., awaiting the opportunity to approach or receive their lading from the boats.

That with a view to obviate this inconvenience so far as practicable, and for the more convenient conduct of their business, the defendants formed a plan of alterations in the arrangement at and upon the wharf and pier as follows: to remove the building theretofore used as an office, to erect another building for an office, extending from the southerly side of the pier southwardly so as to leave the whole width of the pier at its junction with West-street accessible from the street, connecting therewith an open picket fence with gateways along the street at the entrance to the pier, and extending southerly to the southerly line of the premises occupied by the defendants, and from two of the posts of the fence to extend a roof westwardly over a part of the pier to the roof of a shed heretofore covering a portion of the westerly part of the pier so as to form a covered passage way (open on all sides) from the street to the gangways of the boats which lie along the side of the pier.

That the proposed new erections formed one entire plan, of which the defendants caused a plan or drawing to be made, and the affidavits state that before the alterations were begun, a diagram of the alterations was delivered to George Harrison, (the plaintiff by whom the complaint herein was signed and verified,) and left with him for his examination, and he afterwards went with the defendant Newton to the wharf and received from him a minutely detailed explanation of the whole plan, and expressed himself satisfied therewith and approved the same in all its details, and thereupon the association proceeded with the alterations.

They removed the office building, built the fence with its gateways or entrances, commenced the new office building, and when nearly completed, the present plaintiffs filed a bill in this Court alleging that the defendants were erecting a public nuisance injurious to them in their property, and praying the Court to restrain the defendant from proceeding with the erection of the building and

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fence, and from erecting any other building or fence in the place thereof, at or on the wharf or bulkhead.

Upon that bill (the parties having been restrained till the motion could be heard) a motion was made at Special Term for an injunction restraining the defendants during the pendency of the suit, and after full argument the motion was denied.*

Thereupon the defendants completed the building, and proceeded to the extension of the roof from the posts of the fence westward to the shed before mentioned, in completion of the plan of alterations aforesaid.

The plaintiffs now present a new bill of complaint to this Court, and ask that the defendants be restrained by injunction from proceeding with the erection, construction or completion of this roof, (or "building" as it is styled in the complaint) and from erecting any other building in the place thereof, or on the said wharf or bulkhead or "pier," almost in the words of the prayer contained in their former complaint, which is still pending.

It seems to me that it was neither necessary nor proper to commence a new suit for the cause alleged in the present complaint, the injury now complained of results from the execution of one entire plan of alterations; it contains several particulars, it is true, but these are all connected as part of the single purpose of the defendants in removing the former building and refitting the pier and wharf as a landing place for their boats. The former bill was, I think, broad enough in its statements and in its prayer, to embrace the object now sought, and if not a supplemental bill, would have appropriately brought the matter before the court.

It was suggested on the argument that the former bill was only intended to restrain the erection of the fence and new office building. That the injunction therein sought was denied upon the ground that they were so nearly completed that no further injury could result to the plaintiffs by permitting the defendants to finish them, and that an injunction would therefore be useless, and that the defendants thereupon commenced the construction of the roof, which it is supposed by the plaintiffs this Court would not have permitted had their intention to construct the roof sufficiently appeared.

The facts stated in the former bill, if the plaintiff's view of their rights be just, warranted the prayer which the bill in fact contained, that the defendants be restrained from the erection of the building and fence specifically named, and "from erecting any other building or fence in the place thereof, at or near the wharf or bulkhead." But if otherwise, and the court were not fully informed of the intention of the defendants to construct the roof now in question, or were misled into the belief that their erections were nearly completed, a supplemental complaint, if not an application by motion in the same suit, would have brought the new matter before the court for consideration.

* See Report ante, p. 311.

I make these suggestions because the present application seemed to me, on the argument, and now appears *in effect*, to review at special term before one of the judges of the court the same *questions*, (between the same parties, affecting substantially the same subject matter,) which were properly raised before another of the judges, under the form of a different suit. But it is not necessary, and perhaps, therefore, it would be improper for me, in this stage of the cause, to decide whether the two suits can both be continued and prosecuted together or not.

There are sufficient reasons for withholding the injunction sought, conceding that the alleged causes of action are so far several that the plaintiffs may be permitted to prosecute both suits to judgment.

1st. So far as the decision of the motion in the other suit was based upon principles applicable to this, they have my full concurrence; and if they had not, I should respect the views of my associates so far as to leave the plaintiffs to their appeal to the general term of the court, the appropriate place for reviewing the decisions made by the judges severally.

2d. George Harrison, the active plaintiff, by whom the bill is signed and verified, not only stood by and saw the defendants engage in and commence the work, without objection, but examined and approved the plan in all its details, before the work was begun.

If, therefore, the court were satisfied that the erection complained of were a nuisance, it ought not to be restrained at his instance, for no injunction should be granted to restrain an erection, as a nuisance, where such erection has been acquiesced in, and still less when it was encouraged by the party seeking relief: vide *Saunders v. Smith*, 3 Myl. & Craig, 711; *Lewis v. Chapman*, 3 Beav., 133.

It was urged that the other plaintiffs are not bound by his acts—perhaps not so far as to affect their strict rights. But it is manifest that they have chosen to identify themselves with him by uniting with him, or suffering him to use their names in this suit; and, besides, both they and he have chosen to lie by until the defendants had actually removed their office building, for many years used for their business, and then interpose to prevent the erection of another in its stead.

3d. This complaint proceeds upon the ground that the construction of this roof is a public nuisance. So far as the action of this court is invoked on that ground, this court ought not, in this preliminary state of the suit, to interfere by injunction, unless there is satisfactory evidence that it will be more advantageous to the *public* that this be done. This is by no means clear upon the papers submitted.

The complaint itself, very feebly, if at all, alleges it, while the affidavits on the part of the defendants go very far to establish the contrary. The inconveniences which led to the alterations; the interests of the defendants in promoting the public convenience; the fact that for more than sixteen years the defendants have appropriated this wharf and pier to the use of their steamboats, and now propose to continue to use it for the same purposes with enlarged facilities for access and egress, and the nature of the alterations

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themselves, seem to me to repel the idea that the public will derive any benefit from their suppression, or are at all incommoded by their continuance: and this seems especially apparent when it is also considered that the City Councils, in 1834, designated and appointed these identical premises to the exclusive use of steamboats, and that the ordinance to that effect is still in force. If other steamboats may approach and lie at this pier and wharf, it is exceedingly difficult to perceive why arrangements so convenient to defendants' boats should not also be found convenient and useful to such others. But whether the projection of the new building or its foundations into or over the slip or the bulkhead forming the westerly line of the streets and the enclosure made by the fence and gateways do in any degree inconvenience the public, is not the question raised in this suit. My enquiry is simply whether the extension of the roof in question so as to cover a portion of the passage way, produces that result. And as to this, what is above suggested not only applies, but the defendants, I think, fail entirely in showing that such a protection to passengers and goods from rain and storm can be other than a public convenience.

4th. The plaintiffs' counsel on the argument insisted that the erection of the roof in question ought rather to be regarded as a purpresture or an encroachment upon a public street and wharf. In England a purpresture is regarded as an infringement of rights held by the crown. In this country held by the people of the State in their collective capacity.

A purpresture may or may not be a public nuisance; if it be a nuisance as well as a purpresture, this court may properly be called upon to restrain or suppress it, and the court will be governed by the same rules in exercising its discretion as in other cases of public nuisance. But if it be a purpresture merely (whatever remedies the crown or the people of the State may have at law) a court of equity will not interfere by injunction, either temporary or final, unless the interests of the crown in England, or the people in this State, require it. As a mere purpresture, I apprehend that individuals have nothing to do with the question of its continuance or abatement.

Whether this be regarded as a purpresture, or public nuisance, or both, I have already suggested that the evidence does not, in my judgment, establish a case calling for summary interference in this stage of the cause upon that ground.

5th. It is urged that the erection now sought to be restrained is not only without right, but is contrary to law, and therefore that this court ought to restrain it at the instance of any individual who is prejudiced thereby. To warrant the granting of the preliminary injunction, the proof of injury ought to be very clear. The mischief should be shown to be irreparable and the danger pressing, otherwise the case should be suffered to go to a hearing when the rights of the parties can be fully ascertained and settled. I am not satisfied that the extension of the roof in question will produce any mischief whatever to these defendants. For the last sixteen years the pier in question has been used exclusively by steamboats under the ordinance of

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the city. The defendants do not appear to be engaged in running steamboats; nor do they pretend that this roof will prevent them or any other from the full enjoyment of the pier for all the purposes for which, under the city ordinance, it can be used. How then can they be injured? In the complaint it is said that the value of the rents of their stores is diminished. This can only mean that the value of the rents, in the opinion of the defendants, *will be* diminished, for if the erection is not yet made, the injury must be prospective; this is denied by numerous witnesses, and appears to me entirely incredible. It may be true in respect to the building and fence along the bulkhead, but that is not the matter before me. That the roof the erection of which I am asked to restrain can have such an effect is very far from apparent, and the conflict of opinion makes it at least very doubtful; the allegation in the complaint by Suydam, Reed and Suydam imputes the anticipated injury in terms to the obstruction of the bulkhead; no doubt the other defendants had this in their mind, and yet, as before remarked, that is the subject to be enquired into and disposed of in the other suit, and not in this; nor if it should seem to me that possibly the defendants may be prejudiced, is this a case of such clear violation of right, an act so plainly contrary to law, that the court should in this stage enjoin, unless satisfied that the injury likely to happen *pendente lite* will be irreparable. The lessors of the defendants, and the defendants through them, have a right to use this pier, slip and bulkhead for all purposes consistent with the right of the public to use the same for the purposes of commerce as a landing-place and street, under such regulations of the State as the Common Council may impose. In 1801 the Legislature forbade the erection of any building upon West (and other) streets, or between it and the river (vide Act of April 3d, 1801, § 10). In 1830 the Legislature authorized the Common Council to designate such public wharves as they might deem expedient, and such private wharves as the owners might request, "for the exclusive use of steamboats," (vide Act of April 16th, 1830, § 1).

Under this last Act the Common Council, in 1834, as above stated, appropriated the slip, wharf and pier now in question, to the exclusive use of steamboats, as they were authorized to do.

In 1832 the Legislature authorized the lessor of the defendants, on obtaining the consent of the Mayor, &c., to erect a building upon the premises, and in 1851 they passed another Act, in which they authorize the heirs of such lessor, or their representatives, to grant a convenient building for the transaction of business on the wharf.

I find nothing in this last law, in terms or by implication, requiring the consent of the Mayor, &c.; so far from it, the authority is expressly given, "anything in the last named Act to the contrary notwithstanding."

The plaintiffs, by the authority and direction of the heirs of Daniel Clarke (lessors) are making the erection complained of. Surely I need not say that the defendants ought not to be summarily restrained or forbidden to exercise the right conferred by the terms of

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the statute, unless it is very clear that irreparable mischief will happen *pendente lite*, if this be not done. So far as it is charged that the public will be prejudiced, it is proper to say that the presumption is, that the Legislature will not authorize a nuisance, and that the public will not be prejudiced by the exercise of the power in terms given by the Act.

But it was argued that the Common Council have rights of property inconsistent with the law, that it is therefore unconstitutional. When the corporation of the city become complainants and set up these rights it will be time enough to consider the effect of their grant.

And if this law unconstitutionally interferes with their power to regulate and control the streets, docks, slips or piers, they will readily find redress for themselves.

Without at all attempting to settle, upon mere affidavits, either the question of right between these parties, or to determine the disputed question of damage, it seems to me enough has been said to show that both are doubtful.

The power of a court of equity to interfere summarily with the business of the citizen, and stay his hands, it may be for six months, and it may be for years, before the full merits of a controversy can be examined and settled on the hearing of a cause, is not lightly to be exercised. Salutary as the use of this power often is, it is in a degree arbitrary, and a wise discretion ought to be the guide in its exercise. It has seemed to me that we should be jealous of a discretion which may so easily be abused, and that safe precedent demands forbearance in all cases of doubt. The cases are now so numerous in which our courts are called upon to enjoin, and in which, in fact, they are by statute authorized to enjoin, that there is danger that the harsh and arbitrary character of this summary interference may be overlooked. The courts in their integrity will not, it is true, suffer them to be used for the purposes of oppression; but, in my judgment, the necessity should be plain before the power is exercised.

It was conceded on the argument that if the right be not plain, and the injury be doubtful, the injunction ought not to be granted.

The motion must be denied, with the costs of the motion, \$10.

Supreme Court.

Rensselaer Special Term, Feb. 1851.

MOTION TO STRIKE OUT REDUNDANT OR IRRELEVANT MATTER.

STEWART AND OTHERS agt. BOUTON AND ANOTHER.

Irrelevant and redundant matter struck out of an answer with costs, because it did not come within the principle of pleading laid down in *Williams v. Hayes* (5 How, 470.)

The action is brought upon an undertaking executed by the defendants upon an appeal, pursuant to the 834th section of the code. The appellant was one

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Beardsley, who had brought an action against the sheriff of Saratoga, to recover the possession of personal property which had been seized by the sheriff under an attachment against a non-resident debtor. Beardsley had previously executed a mortgage upon the same property to one Stover, who, at the time the action was brought to recover the possession of the property, executed to the sheriff the undertaking required by the 209th section of the code. Judgment having been rendered against Beardsley in the original suit, an action was brought against Stover upon his undertaking, in which judgment was also recovered. This judgment was compromised by Stover, and satisfied. The judgment against Beardsley having been appealed, was affirmed, at a general term of the Supreme Court, and from the judgment so affirmed, an appeal was brought to the Court of Appeals, where the judgment was again affirmed. The plaintiffs, who are the assignees of the undertaking, claim to recover in this action, not only the costs upon the appeal, which amount to \$97.47, but also interest upon the judgment affirmed, to the amount limited in the undertaking. The defendants in their answer, among other things allege, that as sureties on the appeal, they are not liable to pay interest upon the judgment from which the appeal was taken, since no stay of execution was had or obtained; also, that they executed the undertaking at the request and upon the indemnity of Stover; and that the property mortgaged to Stover was worth little or nothing over and above the amount for which it was mortgaged. These three allegations the plaintiffs ask to have stricken out of the answer.

E. F. BULLARD, for Plaintiffs.

A. B. OLIN, for Defendants.

HARRIS, J.—I feel constrained, under the rule, which I understand now to be well settled, in respect to pleadings under the code, to grant this motion. Neither allegation involves a material fact, or tenders to the opposite party a material issue. The first is merely a conclusion of law. The defendants may, perhaps, be right in supposing their liability is limited to the costs upon the appeal; but if they are, the question cannot be the subject of an issue of fact. It is a conclusion of law which will arise upon the facts in the case. The other allegations present issues wholly immaterial and unnecessary to a proper decision of the case. Whether or not the undertaking was executed at the request and upon the indemnity of Stover, cannot affect the liability of the defendants in this action, one way or the other. Nor can it, by possibility, be material whether the property in question in the original suit was worth more or less than the mortgage to Stover (see *Williams v. Hayes*, and *The Renesse-laer and Washington Plank Road Company v. Wetsel*, *ante*.)

The motion must be granted; and although I am convinced that the irrelevant matter has been inserted in the answer through inadvertence, I feel obliged, in reference to the principles already established, and in view of the necessity of holding the profession to a more strict attention to those principles, in framing pleadings, to allow costs upon the motion also.

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[MONTHLY PART.

N. Y. Court of Appeals.

THE CONTRACT OF ENDORSEMENT.

CAYUGA COUNTY BANK v. E. A. WORDEN AND F. L. GRISWOLD.

For a statement of the facts and circumstances of this case see *Legal Observer*, v. 7., p. 114.

GRAY, J.—This is not the case of separate and successive endorsers. The note in question was drawn payable to the defendants jointly as payees, and having been endorsed by both, their endorsement by legal operation became joint also. The notice of protest should, therefore, have been directed to both, or the endorsement should have been referred to as their joint endorsement. The notice served in this case being addressed to them severally by name, by legal as well as grammatical construction, refers to a separate and individual endorsement of the party addressed, and is for that reason insufficient.

The notice, in order to have made it sufficient in this respect, should have described it as the note endorsed by the defendants jointly. The notice directed to E. A. Worden instead of describing the instrument as "*S. Worden's note endorsed by you*," should have stated it as *S. Worden's note endorsed by you and F. L. Griswold*, and so the notice to F. L. Griswold should in like manner have described it as *S. Worden's note endorsed by you and E. A. Worden*. Or if the address of the notice had been to both the defendants, naming both instead of one only, then the notice in the body, in the form used, would have been sufficient to inform them, respectively, that it was the note endorsed by them jointly for S. Worden.

For instance, if the notice had been addressed to E. A. Worden and F. L. Griswold, and had then in its body stated it as *S. Worden's note "endorsed by you"*, that would have been a sufficient notice that it was a note endorsed by them jointly. The notice is therefore defective on this ground.

But besides this defect for misdirection, which I deem important, the notice was still more clearly and unquestionably defective in misstating, in the body of the notice, the amount of the note.

The amount given in figures, at the head or margin of the notice,

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formed no essential part of the notice, and in determining its sufficiency is entitled to no consideration. Although usual, as a convenient reference for the amount, to prefix, or affix, to a note the sum in figures, yet it forms no part, or at all events no controlling part, of the instrument. In *Saunderson vs. Piper*, 5 Bing. N. C. 425 and Bacon's Law Tracts, pp. 99 and 100, cited in Note 1. Greenleaf's Ev. vol. 1., p. 432, 3d Ed., where a bill was drawn expressing £200 in the body in words, but £245 in figures in the margin, it was held that the words in the body must be taken as the true amount to be paid, and that the ambiguity created by the figures in the margin was patent and could not be explained by parole.

In no case that I can conceive can the insertion, in the notice of protest, of the figures prefixed to a note, be useful, except in the case where the notice has the note incorporated in it, and it is referred to as a copy of the note in *hac verba*. But in such a case, clearly, as in the case of the note itself, the amount in figures in the margin or prefix, if it varies from that in the body in words, must yield; and that in the body must be taken as the true amount of the note, and as the controlling sum in the notice. Now apply to the case under consideration the rule of the cases referred to, and which I consider a rule sound not only in principle but pre-eminently safe in practice, and it will be entirely clear that the amount given in the body of the notice in writing must control and must be taken as the true amount of the paper protested; and that explanatory parole evidence and proof of facts extrinsic of the notice was inadmissible and should have been excluded.

The notice, in this case, does not in fact, nor does it pretend, to give a copy of the note, and the prefix thereto of the amount in figures is consequently of no importance; nor is at all serviceable to convey to the defendants that information which it was the office of the notice and the duty of the Bank to communicate.

The amount given in writing in the body of the notice governs, and is the legally controlling, and was indeed the only effectual, designation of the amount of the note. An omission to give the amount of the note altogether would, under the circumstances of this case, certainly have been less objectionable than the insertion of a mistaken sum; yet no one will pretend that such an omission would not have been fatal to the notice in this instance.

The question is not whether the defendants by this notice were or were not misled, but were they so notified thereby as to become fixed as endorsers. They doubtless well knew on the receipt of these notices that they had endorsed for S. Worden no such note as the one referred to in the notice; and they were therefore not called upon or at all liable to take steps to the security either of the Bank or of themselves.

They were no doubt aware that they had jointly endorsed a note for S. Worden for six hundred dollars, but of the non-payment of that note by the maker, the notice contained no information, nor were they ever notified, and they had reason therefore to conclude that that note was actually paid. The notice of protest of a severally

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endorsed note for S. Worden *for three hundred dollars*, cannot be presumed, nor is it claimed even by the plaintiffs, in itself, to have given to the defendants information that the note for *six hundred dollars* endorsed by them jointly for the same maker had been protested for nonpayment.

The true enquiry is, did the notice in itself communicate to the defendants the information which the law holds indispensable to fix them as endorsers? Were they duly advised by the *notice* that the note of \$600, endorsed by them jointly for S. Worden, had been protested for non-payment?

It is entirely clear that the notice in itself conveyed no such information, and the introduction by the plaintiffs of evidence *aliunde* to show knowledge in the defendants, is a virtual concession of the insufficiency of their notice. Besides fixing the liability of the endorsers, the office and object of the notice is to give the endorsers an opportunity to provide for their indemnity. The notice in this case was entirely insufficient for that purpose, nor was it sufficient to put the defendants on enquiry. They well knew that no such note as the one described in the notice had ever been endorsed by them, and until they were duly notified of the demand and non-payment of the note they had actually endorsed they were under no obligation to make inquiry or payment. It was not their business to call on the Bank for information on the subject; but it was the business of the Bank to give to the defendants all the information required by law to fix them as endorsers, and having by a mistake in the notice failed to do so the consequences are with the Bank, and the defendants are exonerated from the payment of the note. To be effectual the notice must be sufficient in itself; it should contain and carry upon its face all the information essential to the communication of full knowledge to the endorsers, and its sufficiency should not in any respect depend upon the proof of facts or knowledge extrinsic of the notice.

Proof that the note in question was given in renewal for a balance due on one previously endorsed by the defendants for S. Worden, and that this was the only note in the Bank made by S. Worden and endorsed by them, was upon principle as well as the authorities before cited inadmissible and should have been excluded. But allowing that this evidence was properly admitted, even then it does not aid the notice or render it sufficient.

By the introduction of this evidence the plaintiffs, as we have already seen, substantially admit the insufficiency of the notice; and the question then is, does this evidence correct the mistake and supply the deficiency of the notice? Or does it establish the position that by the notice and the existing facts proved the defendants were duly apprised that their jointly endorsed note for S. Worden for \$600 was protested for non-payment? I am of opinion that it does not.

The effect of the proof, as I view it, was only to show more clearly the insufficiency of the notice. If it proved any thing, it proved that no such note as the one given in the notice was held by the Bank, and that consequently the defendants were by the notice subjected to no duty or liability whatever. To hold that a notice of protest

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of a note for \$300 which the Bank did not hold was a good notice of a note for \$600 which it did hold, would be a conclusion inconsistent alike with sound law and sound logic. It would be preposterous to hold that because the Bank held no other note endorsed by the defendants than the one for \$600, that therefore the defendants were bound to know that it was their note for \$600 which was referred to in the notice.

The facts proved did certainly not correct or in anywise alter the notice, or establish its sufficiency. But the rule, as I understand it, does not admit parole proof of facts extrinsic of the notice, or if such is not the clearly settled rule it is important that it should be so settled. A contrary rule would be alike unsound and unsafe. Endorsers under a contrary rule—inasmuch as they would be unapprised of the facts which on the trial they would have to meet—would consequently be unprepared, and would thus be liable at all times to surprise and imposition.

The evidence in this case, extrinsic of the notice, was inadmissible, and should have been excluded, but giving to it full effect, in either event the defendants had not notice or knowledge sufficient to fix them as endorsers, and the judgment of the Supreme Court must be affirmed.*

Court of Common Pleas.

Before WOODRUFF and DALY, Judges.

MARTIN ET AL V. TRASK ET AL.

DAYS OF GRACE ON BILLS PAYABLE AT SIGHT.

A Bill of Exchange drawn payable at sight, (in the absence of evidence of any particular local custom of the place where it is payable,) is due and payable on presentment to the drawee.

It is not settled, that, by the general principles of commercial law, days of grace are allowed on bills payable at sight; the instrument is, therefore, to be construed according to the natural and ordinary import of the language employed.

Bills payable in terms on demand—bills having no time of payment specified, and bank checks, are well settled to be due and payable instantly on presentment.

The only harmonious rule on the subject of days of grace would seem to be that, where time of payment is in terms given to the drawee—as after sight or after date—or by naming a future day, days of grace are to be computed and allowed to him; but where the terms of the bill import immediate payment on presentation, its terms are in this respect to be pursued.

It seems, a local custom or usage of the place where it is payable, (if any exist,) allowing days of grace on such bills, might be shown.

This was an action against the defendants as drawers of a Bill of Exchange, drawn in New Orleans upon a firm in New-York.

* See New-York Legal Observer, vol. 7., pp. 114, 169, 233, 265; vol. 8., p. 41: vol. 9, p. 225: 1 Comstock's Reports, 413.

It was presented to the drawees, and payment demanded on presentment, which being refused, the bill was protested for non-payment, and suit brought thereon.

The plaintiffs claimed on the trial upon several grounds, some of which were founded on facts which they insisted rendered a demand, protest and notice, unnecessary; but they claimed especially that the demand, protest and notice were regular, and fixed the liability of the defendants as drawers.

The defendants insisted that days of grace were allowed by law upon bills payable at sight, and that therefore there should have been a presentment for acceptance, and for want thereof the drawers were discharged.

Neither party gave, or offered to give, evidence of any local custom in the city of New-York relating to the matter.

A non-suit was ordered upon the ground that days of grace were allowed on such bills, and, therefore, that a presentment for acceptance was necessary.

C. W. POTTER, for Plaintiff.

E. PIERREFONT, for Defendant.

WOODRUFF, J.—It would seem hardly credible that at this day doubt should exist regarding the question whether a Bill of Exchange drawn payable at sight, is due on presentment or on the third day thereafter.

Had it depended upon the deductions of reason, or on the principles of the law, viewed as a science, a question of such everyday application to the business of a commercial state would have been long since settled. This, however, is the main question raised by the Bill of Exceptions in the present case; and as this question, if not the only one raised, is conclusive in the view which I have taken, I have considered no other.

A mercantile contract is *prima facie*, to be construed like every other contract, according to the plain and ordinary meaning of the language employed therein, unless by immemorial usage of universal acceptance its import has received some modification.

Of this *prima facie* meaning, whether founded upon such obvious import of the words, or on such usage, the court are to judge, and no proof can be received.

Such contracts are, nevertheless, to be deemed made with reference to the usages and customs of the place where they are to be performed, and the subject matter to which they refer, and, therefore, a local custom, or a peculiar technical term or phrase, (whose meaning is not already settled in the law,) may be the subject of proof by witnesses, to ascertain and fix the real intent and meaning of the contracting parties.

The language of a Bill of Exchange on its face expresses a simple request that the drawee will pay a certain sum to the payee or to some person to be designated by him at a time in the bill mentioned.

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But by universal acceptance, recognised for more than three hundred years, the drawing of a bill implies that the drawee shall legally accept the Bill, and pay it on presentment when it becomes due; and if not, then that the drawee will on due notice pay the same with damages, &c. Thus far the obligations of the drawer and the correlative duty of the holder to present and to give notice are simple, and though grafted upon the words of the Bill are in entire harmony with their literal import.

Commercial usage has, however, introduced an element, to be taken into view in determining *when* a bill does in fact become due, which is not in accordance with the language of the bill, by the allowance of days of grace. In the cases to which such usage applies it has by long acquiescence and universal recognition become law so truly that the allowance of such days forms a part of the contract.

The period of such allowance is not uniform—it depends upon the law of the place where the bill is payable—it even depends upon the *local customs* of the particular town or city where the bill is payable. In England, and in this country, these days have so long and so often been recognised as three in number, that three will be presumed the true number in this country until a clear case of local custom binding on the drawer is shown establishing a different number. This local custom has in some cases been shown. *Remsen v. Bank of Columbia*, (9 Wheat. 58.) *Mills v. Bank of United States*, (11 Wheat. 431.) *Bank of Washington v. Triplett*, (1 Pet. 30, &c.)

The principle, then, that days of grace are allowed, *so far as such principle is settled*, enters into the bill itself, and forms a part of the contract *differing from its terms*. The number of those days is presumed to be three until a local usage to the contrary binding upon the parties is established by proof.

But it does not necessarily follow that every instrument which is in form and effect a Bill of Exchange has days of grace allowed for its payment.

However such allowance originated, whether in the indulgence of the holder or otherwise, it became at last the right of the drawee. But it is in *contradiction* of the terms of the bill, and a departure from its plain import. So far as the usage allowing such departure has ripened into law,—so far as this departure has been recognised and approved—so far, and so far only, should it prevail against the otherwise obvious meaning of the language.

The language of a Bill of Exchange, payable at sight, requires that it should be paid when exhibited to the drawee.

Is it payable according to its purport, or does that usage which has now become law embrace such a bill and alter its otherwise legal meaning?

Prima facie, as already remarked, the language of the bill should govern. This rule of construction is applicable as much to commercial contracts as to any others.

If the language is to be controlled and modified by usage, it may be—

1st. By a usage so ancient and so universal as to form a part of the general law applicable to the subject, or—

2d. A usage of a particular place, uniform within its limits, creating an exception to the general rule, and to be ascertained by enquiry and proof.

In the case before us both parties thought proper to rest their claims upon settled principles of commercial law, without offering testimony to show the existence of any particular custom in the city of New-York creating an exception; and our present enquiry therefore is, whether the language of the bill in question is controlled or modified by a usage of the description first designated.

The following series of propositions furnish a condensed view of the subject.

First. The words, Please pay at sight—or, Ten days after sight—or, Ten days after date—or, At a future day named—or, On demand, all alike import a definite fixed time of payment; the first and last named meaning at the precise time the bill is exhibited for that purpose, and the others meaning at the tenth or other designated day.

Second. Just so far as the allowance of days of grace has been established by usage, and recognised as law, so far it enters into and forms part of the bill, and modifies such *prima facie* import.

Third. In the earliest history of days of grace, and from thence onward to the present day, they have been allowed upon bills payable after date and after sight, or at a future day named.

Fourth. As title to this allowance is founded upon custom and recognition, against the otherwise plain meaning of the contract, such allowance can be claimed only as far as the custom is shown, or has been recognised.

Fifth. Such usage does *not* embrace *all* Bills of Exchange. In this particular, the dictum in the *Bank of Washington v. Triplett*, (1 Pet. 31), was too broad; it was there said that this usage and the allowance of grace enters into every bill or note of a "*mercantile character*"—whereas,

Sixth. Bills payable in terms on demand—bills having no time of payment specified—Goldsmith's Bills and bank checks, are well settled to be due and payable instantly on presentment.

Seventh. Nothing, therefore, can be inferred respecting bills payable *at sight* from the conceded fact that bills payable after sight, or after date, or at a future day, have days of grace, so long as it is no less clearly settled, that bills payable on demand, or without any day of payment named therein, have *no* days of grace.

On the contrary, if analogy furnished any guide, we should say that the term "*at sight*" no less decidedly indicated on the very instant, than "*on demand*," and there would seem to be no more reason for allowing days of grace in the one case than in the other. And in conformity with this view, Montefiori, in the Appendix to his Commercial and Notarial Precedents, says, "A bill at sight is synonymous with a bill on demand, and as such is considered and acted upon," &c.

[Indeed, the only harmonious rule applicable to these different

forms of expression would seem to be: When the terms of the bill give *time*, the acceptor may take days of grace; when the language of the bill requires *immediate* payment, its language shall prevail.]

Eighth. Unless then it is affirmatively settled by commercial usage recognised in such wise that Courts of Justice can judicially declare it to be law, that bills drawn at sight are entitled to days of grace, we must (in the absence of any proof of a valid local custom,) adhere to the plain and natural import of the Bill, and hold it payable on presentment for that purpose.

Our inquiry, therefore, is—"Has it been settled by authority which should be deemed conclusive by us, that bills at sight are entitled to days of grace?"

We may at the outset remark that it is a significant fact, that counsel who have displayed in this cause great ability and research, have not pointed us to a single reported case in which the action was upon a bill at sight, where it appeared, (even as a part of the history of the bill,) that days of grace were in fact claimed or taken, nor in which there is any decision or claim that they ought to be allowed. And in the whole range of litigation upon commercial paper, we have not been able to find such a case.*

It is not enough to say that it was ever before doubted, or that a case to the contrary has not been found. The former assertion is not true in fact—it has been doubted for at least a century and a half,—and as to the latter, it is sufficient to say that to establish a construction at variance with the plain meaning of the language, the burthen lies upon him who insists upon the departure.

Recent elementary writers on the subject do undoubtedly express the opinion that the weight of authority is in favor of allowing days of grace on bills at sight; and some of these are of such distinguished reputation that their deliberate judgment upon questions of commercial law is not only of great weight, but ought not to be disregarded unless it is by themselves, professedly based upon authority which on examination seems unsatisfactory.

Thus the late learned Chancellor Kent, in his Commentaries, vol. 3, part 5, lecture 44, says, the three days of grace apply equally to bills payable *at sight*, or at a certain time, cites Bayley, 141: Chitty, 334-5. But a note to this proposition, found in the 6th edition, p. 102, says, "It may be considered as a point not entirely settled."

The late distinguished Justice Story, in his work on Bills, § 342, after suggesting that there has been some diversity of opinion, adds, "But the doctrine *seems now* well established, both in England and America, that days of grace are allowable on such bills." (Refers to Chitty, Bayley and Selw. N. P., and cases there cited.) But in a note to § 228, he states that, "In England the old writers held that no days of grace were allowed."

In Wheat. Selw. at p. 344, (ed. of 1827) it is said, "The weight of

* The recent case of *Nimick v. Martin*, in Louisiana, afterwards mentioned, may, perhaps, be now reported, but only a notice in a magazine has been brought to our attention.

authority is in favor of such an allowance"; but this observation is preceded by the significant remark, "I am not aware that it has ever been solemnly decided." And for what is here deemed the "weight of authority," the reader is referred by him to the dicta, collected in Chitty, on bills.

Chitty, in the editions of his work, published since 1826, after observing, as he had in his former editions, that, "Though it should seem payment ought to be made immediately on presentment, it is not so settled,—decisions and treatises differ on the question," adds, "But it *appears now to be considered* as settled that days of grace are to be allowed;" (and cites Bayley, Selwyn and Forbes, and the other cases below mentioned.)

Smith in his treatise on Mercantile Law, written in 1834, states the proposition somewhat more boldly. "A bill or note payable after date—after sight—or *at sight* is not payable till three days afterwards."

In the later editions of Bayley, on bills, (vide p. 233, and note of Am. ed. of 1836, from Lond. ed. of 1830.) Bills at sight are grouped with other bills, and are said not to be payable until the last day of grace; and the cases below referred to, *Coleman v. Sayer*, and *Janson v. Thomas*, are relied upon as authority for the remark.

In Forbes, on bills, the same proposition is stated.

In Viner's Abr. Tit. Bills of Exch. B. a reference is made to the case of *Coleman v. Sayer*, (which will be presently noticed) and the proposition reported in Barnardiston as decided in that case, viz: That three days grace are allowable as well where a bill is payable at certain days after sight as where it is payable upon sight—is recited by Viner without comment.

To a similar purport is an observation found at page [65] 89 of Archbold's N. P.

On a careful attention to the citations upon which the remarks made on this subject above referred to are founded, it will be seen that these authors respectively repose very much upon each other; and that the recent editions of Chitty and Bayley are especially relied upon.

Besides, it is manifest that none of these writers, unless it be Bayley, state the rule as of their *own judgment* respecting a rule of law, but only as the "better opinion" of others.

If it should appear that there is no warrant for this "better opinion" except what is created by quoting one another, these dicta of writers who, when they speak independently, are entitled to great respect, cease to bear with much weight upon the decision of the question.

Other law writers have deemed the proposition doubtful; and some have denied it altogether.

Roscoe, on bills, after repeating what is said by Beawes, denying that bills at sight are allowed days of grace, adds, without comment, "But there are *several* authorities to show that days of grace should be allowed on such bills here." [Roscoe, on bills, (1829) 164.]

Byles, on bills, (which was written in 1829,) (1st. Am. ed. p. 152,) very doubtingly says, "Whether days of grace are allowed on bills

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payable at sight *seems yet undecided*. The weight of authority *has been considered* (i. e. by Selwyn, which is cited for the remark) to incline in favor of such an allowance."

Maxwell, on Bills, re-published in this country, from the London edition, with additions, in 1808, states thus, "*It does not appear to be determined whether days of grace are allowed on bills payable at sight. All writers, except Montefiori, express doubt; and the weight of judicial decision and high authority, if they do not make the scale preponderate in favor of the affirmative of this question, are sufficient at least to raise a doubt on the subject.*"

Montefiori, on the other hand (as referred to above), says, "A bill at sight is synonymous with a bill on demand, and as such is considered and acted upon by merchants and bankers."

1 Bell, com. ed. of 1826, p. 410, after stating that if a bill be payable on demand no days of grace are allowed, adds, "When the bill is payable at sight it does not seem settled whether days of grace are allowed or not." And again, "But it is still considered as a point unsettled." A note to this part of the text refers to Chitty, Bayley, and Selwyn; and faintly adds, in reliance upon these writers, "*the bias of authority seems to favor the indulgence of days of grace.*"

I have not been able to examine an early edition of Bayley, on bills; but Mr. Chitty, in his 2d edition, reprinted in this country under the editorial supervision of Judge Story, in 1809, quotes Bayley as evidence that the rule is *unsettled*; and, in Chitty's 6th edition, the 2d and 3d editions of Bayley are referred to for the same purpose.

The work of Mr. Chitty himself, from his first edition to the sixth, i. e. from 1799 to 1826, uniformly declares the question to be *open and unsettled*.

To these are to be added Beawes' Lex. Mer., pl. 256, where the writer, (himself a merchant of wide experience, both in England and on the continent, and frequently cited as authority on mercantile customs,) states, in 1761, in unqualified terms, that days of grace are not allowed upon such bills.

And Mr. Kyd, whose work on Bills, published in 1790, is said to contain the substance of all the judicial decisions down to that time, in like manner states that bills payable at sight are not entitled to days of grace.

I do not, where elementary writers differ so widely, deem it becoming to add that the late distinguished Judge Gould (of Conn.) than whom this country has produced few more skilled in the learning of the law, or more versed in its science, in his manuscript commentaries, says, "Bills payable at sight are not entitled to grace."

Upon this comparison of what is said by various elementary writers, it becomes interesting to inquire upon what their dicta are founded. Looking at these dicta alone, it would seem that, although for centuries prior to 1826, or thereabouts, it had either been declared doubtful, or unqualifiedly denied, that bills at sight are entitled to days of grace, yet, that about that time something occurred which is deemed to have made "the bias" of authority "*incline*" in favor of such allowance.

In pursuing the inquiry, it may be regarded as not a little remarka-

ble, that all the treatises (which give any authority for what they contain, other than similar dicta from the other books which I have also named above) rely upon precisely the same three cases and no others, all of which were decided before Mr. Kyd wrote in 1790, and of course before the early editions of Chitty and Bayley. And yet in neither of these cases was the point now in question at all necessary to the determination of the case before the court, and there is much reason to believe it was neither raised nor decided in either.

The three cases referred to, are—

Dehers v. Harriot, 1 Shower, 164, decided in 1692; *Coleman v. Sayer*, 1 Barnard, K. B. Rep., p. 303, decided in 1728; and *Janson v. Thomas*, 3 Doug., 421, decided in 1784; in which case Justice Buller mentions that on some former occasion, a special jury certified that on bills payable at sight, three days were allowed.

The first of these cases, *Dehers v. Harriot*, did not involve any questions regarding bills at sight nor days of grace. A bill was drawn payable to A., indorsed by A. to B., and *some time after the bill had become due*, B. endorsed to D., with the additional words, "value on my account." After such last named endorsement, and before presentment for payment, the bill was lost, and a copy was presented, and not being paid, protest was made by such copy. Two questions appear to have been presented to the court, and two only—

1st. Whether B. could sue on the bill, notwithstanding his qualified endorsement to D.?

2d. Whether, if a bill be lost, protest may be by copy? and these appear to have been the only questions decided.

It is obvious, therefore, that no question touching days of grace was passed upon. And yet there appears, by way of "Note by the Reporter," the following observation, which is all that furnishes an apology for citing the case as authority in this matter. "Some merchants said, if a bill be negotiated by endorsement after the bill was payable, there was no need of protest at all. Others said that a protest must be in some convenient time. All agreed that if there be an acceptance, the protest must be at the day of payment; if at sight, then at the third day of grace, and that a bill negotiated after day of payment, is like a bill payable at sight."

The rambling conversation of the jury set down as a memorandum on the reporter's minutes, could not in any case be regarded as authority, and especially when the point was not before the court.

In the next place, this volume having been prepared for the press, and printed after the reporter's death, it is very doubtful whether the note has even the sanction of his name.

Further, it is now entirely clear that the first proposition, in the note, is not law, and it is no less certain, that if "a bill negotiated after day of payment is like a bill payable at sight," then a bill at sight has no days of grace, for a bill so negotiated has none.

The case to which the note is appended shows this, and see 1 Bell Com. B. 3, ch. 2, § 4. p. 403; 1 Sandford Spr. Ct. Rep. 202, and *cn. cit.*

The next case, *Coleman v. Sayer*, arose as follows:—An action was brought against the defendant as endorser of a Bill of Exchange

payable *six days after sight*. The bill was presented for acceptance, and accepted on the 8th of February; on the 19th the acceptor *failed*, the bill not having before that time been tendered for payment. It is said in the report of the case in 2 Strange, 829, that the jury were of opinion that the *drawer* was discharged at the end of the three days of grace. No question was made whether days of grace were allowable, but the holder appears to have claimed that even *more* indulgence might be granted to the acceptor, without losing his recourse to prior parties.

But the report, as given in Barnardiston, states two questions, neither of which, (if the facts are correctly stated by Strange,) were pertinent, nor could they have affected the result, however they were answered.

1st. Whether the day of sight is to be reckoned one of the six?

2d. Whether the three days are allowable by the custom of London as well where a bill is payable at certain days after sight, as where it is payable upon sight.

The Chief Justice is reported to have said that "the days of grace were allowable in one case as well as the other."

Obviously no answer to these questions could have entitled the holder of the bill to recover; if days of grace were allowed, (as appears by the report in Strange they were) he was in default; if not allowed, his laches were still greater.

If the case be of any importance whatever to this discussion, it is because, according to the report in Barnardiston, it would seem to have been *taken for granted* that bills at sight were entitled to days of grace.

Taking for granted a matter which cannot affect the case in hand, and which, therefore, no one has any interest to scrutinise or deny, never amounts to authority of any weight.

On comparing the two reports of this case, it is exceedingly doubtful whether the report in Barnardiston is not altogether a mistake—and if not, then it is an obiterdictum, uncalled for and immaterial, and entitled to little consideration.

When to these considerations, there are added the criticisms which may be found in "The Reporters," by Wallace, Phil., 1845, and in Marvin's "Bibliographia, Legum," pp. 93-4, and 646, on the degree of credit to be given to Shower and Barnardiston's Reports, it seems to me that no weight should be given to them on this question.

And again, if there had been an adjudication in 1728 not overruled, which is now entitled to be regarded as an authority on the subject, it is very extraordinary that Lord Mansfield, in 1784, should have stated the matter to be in "*great doubt*," without noticing the fact that such an adjudication was ever made.

The third and only remaining case is, *Janson v. Thomas*, 3 Douglass 421, (cited by Chitty and Bayley, as *JAnson v. Thomas*, B. R. Trin. Term 24, Geo. 3d,) which was decided in 1784.

The distinct and only question was, whether a bill at sight was within the stamp act of 22d Geo. 3d; that act having in terms excepted "Bills payable on demand."

It was contended that bills drawn payable at sight were *in fact*

payable on demand, not being entitled to grace; and so, by implication, were within the exception.

Lord Mansfield says distinctly, "I believe there is great *doubt* as to the usage about the three days of grace. But the *words* of the act are 'on demand,' and I think we cannot make a further exception by implication."

Ashurst, J. "I am of the same opinion; we had better go upon the words of the act than *make a precedent* which may affect trade."

And Buller, J. says, "I think payable on demand is the same as "*drawn payable on demand.*"

Clearly this case settles nothing unless it be that there was *no established* custom to allow days of grace on such bills. It is true that Buller adds, "The other point is *doubtful*, but it is not new;" and mentions that, some forty years before, a special jury had certified that on bills of sight three days were allowed; and he says, also, he knows they now differ about it in the city, but in general it is taken.

If these cases settled the law, on this subject, to be as now stated by Chitty, it is passing strange that Beawes, in 1761—Kyd, in 1790—Bayley, in 1789—Mr. Chitty himself, in 1799,—should not have known and appreciated their value as authority; and especially that Sergt. Bayley, through at least three editions, and Mr. Chitty through six, coming down to a late day, should have remained so unconscious of the error in all that preceded.

It does not appear that a case had been adjudicated, since 1784, in which the subject had been alluded to; and yet, with no new authority,—apparently *ex mero motu*,—Sergt. Bayley alters his text so as to induce the belief that this doctrine was now settled. Mr. Chitty thereupon states the same thing, taking care to cite the last edition of Bayley as his warrant for altering his own text.

Justice Story, following Chitty, states that so "it seems;" and the learned Chancellor Kent adopts language somewhat more positive; while a note informs the reader that it is *not* entirely settled.

Upon this review of dicta and alleged decisions, it appears to me that we cannot say that by law, days of grace are allowable upon a bill at sight.

I ought however to admit that Judge Strawbridge, of the Supreme Court of Louisiana, is reported to have said upon this question, in the somewhat celebrated case of Nimick vs. Martin, that as an abstract question of the common law he had not doubted for the last thirty years that such bills were entitled to grace.

With great respect for the learned Judge, it may be questioned whether a paragraph on the subject could, thirty years before, have been found, in which doubt was not expressed upon the subject; except when the doctrine was denied, and if the convictions of his own mind were then settled by *authority*, we regret that the cases, or dicta, which removed the uncertainty have not come under our observation.

I do not deem it unbecoming to doubt what Beawes, Kyd and Montefiori, in the last century denied;—what Lord Mansfield and his associates all doubted in 1784;—what Chitty and Bayley for nearly thirty years declared unsettled;—what Maxwell deemed un-

determined in 1808;—what Byles, in 1829, says, “seems yet undecided”;—what is declared unsettled in the last edition of Kent;—what the other writers named mention with so much of indecision and qualification;—and what has not been decided in any adjudged case that is brought to our notice; and especially what has never, so far as can be learned from reported cases, been *acted upon* as Law in England, nor in this State.

In Massachusetts, where days of grace are allowed on such bills, there is a statute making express provision therefor. It has been suggested that this statute is declaratory of the common law. This suggestion is hardly warranted. The Supreme Court of that State had, before their statute was enacted, decided that in that State no days of grace were allowable on promissory notes unless stipulated in the contract itself. If this decision was correct, one object of the statute was to introduce a *new* rule in regard to notes, and much the most probable inference from the enactment is that in view of the discrepancy and doubt on this subject affecting the different forms of commercial paper the legislature thought it best to provide for all cases by an explicit uniform rule.

But, further, in the Court of Exchequer, in England, as late as 1834, it was argued by counsel that, on bills payable at sight, days of grace are not allowed. The adverse counsel do not deny this, but seek to prevent a recovery upon another ground. The court expressly decline deciding whether such bills are allowed days of grace or not; and dispose of the case upon a ground entirely consistent with the plaintiff's argument that they are *not*. [Vide *Dixon v. Nutall*, 1 Compt. Mees, and Roscoe, 309.]

Examples in *practice* in which days of grace are *not taken*,—and especially where litigation has arisen and no claim is made that such days ought to have been allowed,—also tend to confirm the belief, in the absence of other evidence, that it cannot be declared as law that such bills are entitled to grace. Of this description instances are found in the cases of *Clark v. The Merchant's Bank*, 2 Comst. 382, and 1 Sand S. C. R. 500; and *Kobbi v. Underhill*, 3 Sand ch. R. 277.

The convenience of travellers, by whom such bills are more frequently used, is suggested by Pothier as a reason for denying to them the indulgence of days of grace; a consideration which, in the absence of any established usage to the contrary, is entitled to weight. And the laws of France and Spain are said to agree in this respect.

The view which I have taken recognises a uniform rule, harmonious in itself and convenient of application, viz: That where time of payment is in terms given to the drawee, after sight, or after date, or by naming a future day,—days of grace are to be computed and allowed to him. But where the terms of the bill import immediate payment on *presentation*, its terms are in this respect to be pursued.

My conclusion is that, the language of the instrument, in the absence of any settled legal principle modifying its import, must govern the court in determining its meaning and effect. And that there is no known recognised usage which the court, as a matter of law, can say has given to such bills the allowance of days of grace.

A new trial should be ordered.

A
DIGEST
 OF THE
CASES REPORTED
 IN THIS VOLUME.

[For Index to the Principal Matters, see ante, p. v.]

ADMINISTRATOR'S BOND.

On an appeal from a surrogate's decree, if sufficient is done to constitute, in judgment of law, an approval and filing of the bond required by law, the appeal is effectual, although the surrogate may not suppose that he has officially approved the bond. There is no valid distinction between an *official* approval of a bond and an actual approval; and the not marking it as approved is no ground for such distinction, if it was in fact approved.

If a surrogate retains the appeal and bond, and puts them in a drawer in his office, marked as left by an attorney on a certain day, this is a sufficient filing to comply with the statute. What a *filing* is, defined.

An appeal, if not void, must be got rid of by a motion to dismiss it.

An order giving leave to prosecute an administrator's bond does not affect an appeal if valid; and although obtained on notice, it has no greater effect.

After a decree in a surrogate's court, a notice to a former proctor will not bind a party.
Cullen agt. Miller and others, 62

APPROPRIATION OF STREET FOR RAILROAD TRACK.

To allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunnelling, is not a misappropriation of it, provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and repassage.

The temporary inconvenience to which the adjoining proprietors are exposed, while the work of excavation and tunnelling is going on, is *damnum absque injuria*, and will not entitle a party to damages. Where the land of individuals is taken for a street in a city

and compensation is made for it, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes as custom and the public good require that a street should be appropriated, without making further compensation. *Plant v. The Long Island Railroad Track,* 53

ARREST.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

It is too late to move to vacate an order of arrest after justification of bail. *Barker agt. Dillon,* 310

In an affidavit for the arrest of a defendant, for fraudulently obtaining goods, &c., the facts which may be within the knowledge of the plaintiff, such as the existence of the debt and the manner in which it was contracted, &c., must be stated *positively*. And where any of the facts necessarily rest upon information derived from others, such as the facts of the false representations and fraud on the part of the defendant, they may be so stated; but the sources and nature of the information should be particularly set out, and good reasons given why a positive statement cannot be procured.

The allegation of "information and belief" merely, in reference to such facts, is not enough. *Whitlock agt. Routh,* 95

ASSIGNMENT TO SELL UPON CREDIT AND APPLY PARTNERSHIP ASSETS TO INDIVIDUAL DEBTS.

See PARTNERSHIP.

BILL OF EXCHANGE.

A bill of Exchange drawn payable at sight, (in the absence of evidence of any particular local custom of the place where it is payable,)

is due and payable on presentment to the drawee.

It is not settled, that, by the general principles of commercial law, days of grace are allowed on bills payable at sight; the instrument is, therefore, to be construed according to the natural and ordinary import of the language employed.

Bills payable in terms on demand—bills having no time of payment specified, and bank checks, are well settled to be due and payable instantly on presentment.

The only harmonious rule on the subject of days of grace would seem to be that, where time of payment is in terms given to the drawee—as after sight or after date—or by naming a future day, days of grace are to be computed and allowed to him; but where the terms of the bill import immediate payment on presentation, its terms are in this respect to be pursued.

It seems, a local custom or usage of the place where it is payable, (if any exist,) allowing days of grace on such bills, might be shown. *Martin et al v. Trask et al*, 358

BOND.

In an action on a joint and several bond or obligation against three defendants, one of whom is principal and the others sureties, the parties defendants may be examined as witnesses for each other under the 397th section of the Code of Procedure. *The Mayor, Aldermen and Commonalty, &c., of New-York, respondents, v. Price and others, appellants*, 255

CERTIORARI.

Fears expressed that great, if not insurmountable difficulties will be experienced in attempting to make the provisions of the code, relating to proceedings supplementary to the execution, "available before County Judges and Justices of the Supreme Court at Chambers." *The People ex relat. Williams v. Hulbert*, 245

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

The provisional remedy for the claim and delivery of personal property, under the code, cannot be maintained against a party who had not, in fact, or in law, the possession or control of the property claimed at the time the action is commenced.

Nor can an order for arrest under the subdivision of Sec. 179 of the code be made, except where a party has such a possession. *Roberts v. Randell*, 144

CODE OF PROCEDURE.

See ARREST.

BOND.

CERTIORARI.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

COSTS.

DEBTOR'S EXAMINATION.

LIBEL.

PRACTICE.

PROMISSORY NOTE.

REFRERE.

WITNESS.

COLLISION.

By the settled law of navigation, applicable to vessels, the one close-hauled and the other free, sailing during daylight or a clear night, the free is bound to get out of the way of the close-hauled, by taking proper measures of precaution in time.

During thick and foggy weather, the law exacts from each vessel the greatest care and vigilance to avoid collision, which, if observed, and a collision, notwithstanding, takes place, it is regarded as an inevitable accident.

During thick darkness, mist or fog, the Admiralty Courts have noticed various precautions as proper to be observed by those navigating under these circumstances—such as carrying lights, keeping a good look-out, regulating the speed, notices by fog-horns, bells, and other means, to indicate their respective positions.

No positive law has yet settled that vessels generally are bound to carry lights in the night when sailing; nor have the American Courts of Admiralty recognised any explicit rule as obligatory in such cases.

Held, That no custom was proved of carrying a permanent light at night, while under sail at sea, or in the coasting trade.

The general bearing of testimony indicates that vessels are more misled than aided by a single stationary light on another vessel under sail.

Held, That under the circumstances of vessels sailing during a thick fog, a light should have been within reach of the look-out, to have been exposed, or waved, to give notice to the other vessel of their position, and the omission was blameable.

Held, That in the present case, a suit "in rem" being pending, there was no necessity for a cross suit "in personam" until a decision of the previous suit. Libel in personam dismissed with costs.

Held, That vessels sailing during a dense fog are bound to have on deck all the disposable part of their crew, to aid in keeping a look-out.

Held, To have been a want of vigilance on board of both vessels to trust the look-out to one man.

Held, Under the circumstances, that the master and crew of the vessel lost were justified in abandoning her, and staying on board the other vessel; and, therefore, that their so doing did not culpably contribute towards her loss.

Held, That owners of cargo must be made parties to the suit before they can avail themselves of the operation of the decree. *Jones and others v. The Schooner Hanover*. 232

In Admiralty pleadings the court requires that material facts within the knowledge of the parties should be distinctly stated, and a neglect in this respect is to be taken most unfavorably against the vessel omitting it.

The general rule, that a vessel free meeting one close-hauled, must give way, whether the close-hauled be on the larboard or starboard tack, applies in all cases where the facts are not doubtful as to how each vessel has the wind.

During a dark night or under circumstances making it doubtful which vessel has the wind free, the larboard tack must give way in time, the starboard tack being regarded as privileged, although it may turn out that she had the wind some points free.

Where a practice was set up and a proof given, that on board vessels, more especially coasting schooners, no look-out was stationed exclusively to perform that duty when leaving the port of New-York during daylight, but that all hands were on deck and were considered as sufficiently performing that duty among them.

Held, Such practice to be without law or reason, and that no practice can be more hazardous and reprehensible—that it is most pre-eminently and imperatively the duty of all vessels on leaving this port, at all times to observe the precaution of a vigilant look-out.

Held, That the want of a look-out detailed and stationed for the exclusive performance of that duty, was itself a circumstance of a strong condemnatory character, and exacted, from the vessel neglecting it, clear and satisfactory proof that the misfortune encountered was in no way ascribable to her misconduct in that particular. *Sturges and others v. Bark Maseppa*, 321

Where a vessel is beating, and a steamboat is coming after or behind her, the former has the right, and it is her duty, to run out her tacks irrespective of the course of the latter.

If a collision takes place, and the steamboat sets up that the sailing vessel did not run out her tack, and thereby caused the collision, the burthen of proving the defence rests upon the steamboat.

Held, Under the circumstances, that the steamboat failed in making the necessary proof.

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Held, That where a wharf presented itself as a dangerous obstacle to a nearer approach to the shore by a vessel beating, and at the same time a collision was apprehended from an approaching and following steamboat, those navigating the beating vessel had the right of exercising ordinary judgment to go about and throw the responsibility upon the steamboat of keeping clear of their vessel.

Held, That the vessel beating was not bound to incur a risk by coming up into the wind, and endeavoring to keep that position until the steamboat had passed.

Held, under the circumstances, that the steamboat could, with proper care, having had the other vessel in view a sufficient time, have avoided any collision, and was responsible for the damages. *Twibell and others v. The Steam Tug Keystone*, 289

COMMON CARRIERS.

Sea-going vessels transporting merchandise for hire, are common carriers, and subject to the responsibility of such when that responsibility is not qualified by an express contract or reservation. Courts never assume to engraft exceptions, beyond those indisputably settled by law, to the absolute responsibility of common carriers any more upon water than upon land.

The responsibility of a common carrier may be qualified by a custom or usage of established notoriety.

If the parties annex no qualification by agreement to the undertaking of the master, the marine law applies none. The master is bound absolutely to deliver the cargo as received, unless prevented by the act of God or public enemies.

Blowing of a vessel is a peril of the sea, and not like *sweating*, an incident to navigation which cannot be prevented or avoided by human means.

A sale of the damaged cargo by the respondents, at private sale, is not one binding the libellant. It should have been sold at auction with notice to the ship owner, or at least an appraisement with notice should have been made. *Crosby v. Grinnell and others*. 281

COPYRIGHT.

Although by the 10th section of the act of congress, passed August 10th, 1846, ch. 178, establishing the Smithsonian Institute, it is provided that the author or proprietor of any book, map, chart, musical composition, &c., for which a copyright shall be secured under existing acts of congress, or those which shall thereafter be enacted respecting copyrights, shall, within three months from the publication of the said book, &c., deliver or cause to be delivered, one copy of the same to the

librarian of the Institute and one to the librarian of the congress library for the use of the libraries, the delivery of such copies is not a pre-requisite to a title to a copyright. It seems, however, that the question is not free from some doubt.

To entitle a person to a copyright for a musical composition, it must appear that such composition is substantially a new and original work; and not a copy of a piece already produced, with additions and variations which a writer of music with experience and skill might readily make.

Where the evidence, as to the originality of a composition, is of a contradictory character, the court will suspend a motion for an injunction to restrain the defendants from an infringement of the copyright, and direct an issue of law upon the question.

The title or name, is an appendage to the book or piece of music for which a copyright is taken out, and if the latter fails to be protected, the title goes with it. *Jollie v. Jaques*, 11

A foreigner, by sending to and first publishing his works in Great Britain, may acquire a copyright. *Boosey v. Jeffreys*, 220

COSTS.

On an appeal to the Court of Appeals, from a judgment rendered in a suit pending on the 1st of July, 1848, the costs are to be taxed under the Code, and not under the Revised Statutes. *Bokee, appell., agt. Banks, survivor, respondent*, 135

By the provisions of the code, costs are given to the party and not to the attorney, except where it is a matter of stipulation. *Ward, survivor, &c., appell. agt. Syme and others*, 313

See PRACTICE.

DEBTOR'S EXAMINATION.

Where proceedings supplementary to execution are instituted under the Code, the order for the debtor's examination under the 292d section gives the judgment creditor the same lien upon the debtor's equitable assets which he acquired under the former practice by the commencement of a suit by creditor's bill. And the orders authorised by the 297th and 298th sections, themselves, and without an assignment by the debtor, divest his title in the personal property and vest it in the receiver.

W., on the 5th of January, assigned to C. all his property for the benefit of creditors, with power to sell either for cash or credit. This assignment is void (2 Comst. 365). On the 28th of March an order was made in proceedings supplementary to execution against W., and on the 4th of April P. was appointed a receiver of W.'s property. On

the 30th of March W. executed a further instrument to C. declaring that it was intended that C. should sell for cash only.

Held, That P., the plaintiff, had acquired a lien on the 28th of March, which rendered ineffectual the instrument of the 30th of March, even if otherwise of any effect.

Held, Also, that W. could not at any time after the execution of the assignment to C. revoke the authority therein contained to sell upon credit, and that the instrument subsequently executed was of no avail to render the assignment valid. *Porter agt. Williams and anr.*, 307

DOWER.

Where the husband by his last will and testament appointed his wife executrix, and several other persons executors, one of whom with the wife only qualified, and the testator by his will gave to his wife all his real and personal estate during her life, and then added the following clause—"To carry the above into full effect, I empower the executors to make sale of the first estate, and lodge the proceeds with the executrix, who is to enjoy the same during her life." It was held that the devise was not inconsistent with her claim for dower, that she was entitled to both the devise and her dower, and was not compelled to elect between such provision and her dower. That the power given to the executors to sell the real estate and convert it into money was a mere recommendation, and not a positive direction. It seems she might have been compelled to elect between such provision and her dower, had there been a positive direction to sell the real estate.

Where a husband after marriage gave a mortgage on his real estate in which the wife did not join, and certain contracts for the sale of certain portions thereof, executed by the husband alone, and made by his will the provision above stated for her—and after his death the assignee of the mortgage and several of the persons holding contracts of purchase, one of whom was the defendant in this suit, united and filed a bill in Chancery against her and the devisees under the will, one of whom was the executor that had qualified, and served on the defendants in that suit a notice stating that the object of the suit was to foreclose the mortgage, and that they made no personal claim against the defendants, and in the bill filed by them set forth the rights of the defendants under the will, and that the widow and one of the defendants had qualified as executrix and executor—and then set forth generally that the said defendants (naming them) had, or claimed to have, some interest in the premises, as subsequent purchases, incumbrances, or otherwise; (as authorised by the 132d

rule of the late Court of Chancery), but made no mention of the widow's claiming dower, or any allegation in reference thereto, and the defendants suffered the bill to be taken as confessed, and a decree of sale was made in said suit, and that the purchaser be let into possession; and upon a sale being made under said decree, the assignee of the mortgage became the purchaser, and received a Master's deed. It was held that the title acquired by the purchaser was subject to the widow's claim for dower; that her claim for dower was paramount to the mortgage, and that the decree and Master's deed was no bar to such claim for dower; that the bill was not properly framed to enable the complainants to litigate her claim to dower in that suit; that as there was no allegation in the bill relative to her claiming dower, or that the devise under the will was in lieu of her dower, she was not a party to that suit as doweress, but only as executrix and devisee, and that her claim to dower, being paramount to the mortgage, was not the subject of litigation in that suit; and that, as to that claim, she would not have been a proper party to the suit. *Lewis, appell. v. Smith resp.*, 292

FRAUD.

A bill is not multifarious simply because it states facts, which show that the plaintiff may be entitled to two kinds of relief distinct from and inconsistent with each other, unless it also seeks relief in respect of such distinct and separate claims. If the object of the suit is single, and the prayer is for only one kind of relief, the bill is not multifarious.

Neither is a bill defective for want of parties if the plaintiff can obtain the specific relief for which he prays without the addition of other parties, although facts may be stated in the bill, which, if made the foundation of the prayer for relief, would render the addition of other parties necessary.

It seems that all the directors or trustees of an incorporated company are not necessary parties to a bill seeking to charge any one of them for a fraudulent breach of trust. The general principle that there can be no contribution between wrong-doers, and that each is liable for all the wrongful acts in which he participated, is well established both at law and in equity.

It does not follow that because a party can obtain in substance the same relief at law as in equity, that a court of equity has no jurisdiction. A mere claim for damages, whether for breach of contract, or for fraud in making it, can in general be recovered only at law; but if the object of the suit be to have the contract rescinded, it will be sustained in equity, although the same amount of money

and no other may be recovered in equity as at law.

When a court of equity has once acquired jurisdiction over a particular subject by reason of the supposed defect of remedy at law, that jurisdiction is not lost or taken away by reason of the subsequent greater liberality or enlarged powers of courts of law.

The 51st section of the 4th chapter, of 3d part of the Rev. St. (2 R. S., 301,) which provides that "bills for relief on the ground of fraud shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time," applies to bills for relief on the ground of fraud in *all cases*, whether the jurisdiction in equity is concurrent with, or exclusive of the jurisdiction of courts of law.

The 51st section was intended to qualify and restrict the general terms of the 49th section, and to apply a different rule to bills for fraud, whether in cases of concurrent or exclusive jurisdiction, from that which governs in other cases.

A bill filed for relief on the ground of fraud, which shows on its face that the fraud was committed more than six years before the filing of the bill, should not merely state in anticipation of the defence of the statute of limitations, that the fraud was discovered within six years, but show that it could not with reasonable diligence have been discovered sooner.

Where the plaintiff, who resided in England, alleged in his bill, that he was induced to purchase bonds of the Morris Canal and Banking Company, by the false and deceptive statements of the defendant, who was a director of the company, and was therefore under the most sacred obligation to make correct and truthful representations in the premises, which statements were *calculated and intended to mislead, and were artfully contrived* for that purpose; and there was nothing to excite the suspicions of the plaintiff, and the interest on the bonds was regularly paid until a period short of six years before the filing of the bill. Held upon demurrer, that the plaintiff had satisfactorily accounted for the non-discovery of the fraud within six years after it was committed. *Mayne v. Griswold*, 25

FUGITIVE SLAVE LAW.

The Act of 18th September, 1850, is constitutional, valid, and binding.—Evidence.

Examination of evidence as to identity of fugitive. *In the matter of Long*, 73

A slave, by permission of his master, going for a temporary purpose, into a state whose laws prohibit slavery, and afterwards returned to the state in which he was held to service, does not become free by means of such temporary sojourn in a free state. His

status depends upon the law of the state to which he returns and in which he was originally held to service.

The question depending upon the law of the State of Kentucky, and the Court of Appeals of that state, having decided against the claim of freedom, the Supreme Court of the United States has no jurisdiction over the question.

The ordinance of 1787, for the government of the North Western Territory, is not in force within the State of Ohio, although that state was carved out of that territory.

The six articles in the ordinance of 1787, said to be perpetual as a "compact," are not made a part of the new Federal Constitution, and are not paramount to it, and cannot confer jurisdiction upon the Supreme Court of the United States; the whole judicial authority of the courts of the United States being derived from the Constitution itself, and the laws made under it.

The several states of this Union stand upon an equal footing under the constitution, and those carved out of the North Western Territory are not placed in an inferior condition, as compared with the other states, so as to subject their domestic institutions and municipal regulations to the constant supervision and control of the Supreme Court of the United States. *Strader and others v. Graham*, 99

HABEAS CORPUS.

Charge of perjury, materiality of averment—corrupt design. *In the matter of William C. Clark*, 57

Upon a writ of habeas corpus the court cannot look beyond the colorable authority of the judge who issued the warrant. The court will merely look into the Sheriff's return containing the warrant; and if the court finds that the officer had jurisdiction of the process, and assumed to take proof upon the issuing the same, which proof be adjudged to be sufficient, it will not review his adjudication upon the question, nor undertake to say whether he erred in adjudging the proof sufficient.

If the court thinks that the warrant is *prima facie* sufficient, that is, as far as it will go on *habeas corpus*. *In the matter of the return, &c., of Veremaitre and others*, 129

INDICTMENTS.

A motion to quash an indictment is a proper mode of taking objections to it for want of *form* or *substance*.

It is, however, discretionary with the court whether it will quash an indictment for defect of form.

It is generally sufficient to describe a statutory offence in the words of the statute creating it, particularly so in cases of misdemeanors.

The *United States v. Smith & Ogden*, and the *United States v. Burr*, are precedents establishing the sufficiency of such indictment under the 5th section of the act of June 5, 1794.

The 6th section of the act of April 20, 1818, is substantially a transcript of that. In the *United States v. Henderson*, an indictment under this section, corresponding to that of *United States v. Burr*, decided to be good.

The particulars constituting the offence are matters of evidence and not of pleading.

The indictment in the present case held to be good in point of form.

The law of nations no less interdicts warlike aggressions made directly upon a nation at peace than the aid of one belligerent against another.

They are just cause for reprisal and war. What a nation may not lawfully do in its public capacity in respect to others, the citizens or subjects of it ought not to do in their private capacity.

Q. Whether they can be restrained or punished by the judicial tribunals therefor, under the law of nations, as part of the common law of the land?

The United States government is the first among civilised nations which compelled, by positive law, its citizens, individually, to observe the law of nations towards friendly powers.

The act of 1794 was not intended as merely a neutrality act.

The president invoked the legislation of Congress for further objects than the means of maintaining the neutrality of the United States between belligerents solely.

The act has been accepted by the United States government and judicial officers ever since its enactment, as extending to warlike expeditions from this country, not intended to aid one belligerent against another.

The cases of the *United States v. Smith & Ogden*, and *United States v. Burr*, clearly evince that understanding of it.

Q. Whether a direct attack by the United States, or by individuals from the United States, on a Spanish province in America, is properly a breach of neutrality, though Spain be at the time at war in Europe with a power with whom the United States is at peace?

The act of 1818 has been uniformly treated by the Executive Department and by judges of the United States courts as embracing warlike enterprises set on foot in this country against a friendly power at peace with all the world.

Such, also, according to established rules of construction, is the interpretation to be put upon the language of the act.

Held, That the matters charged in the indictment constitute a violation of the statute, and the motion to quash the indictment denied.

on both grounds. *The United States v. O'Sullivan and others*, 257

INJUNCTION.

Where it appears that a building, in the course of erection, can be completed without increasing the injury to the plaintiff, of which he complains, and that it would be productive of serious injury to continue the injunction, the same will be dissolved.

If the building was clearly a nuisance, the use of it should be prohibited as well as the erection of it. But if the right of defendant to erect the same is a matter only of doubt, it is not proper in the first instance to stay his proceeding in the work by injunction. *Harrison and others agt. Newton*, 311

An injunction should not be granted to restrain or abate an erection as a nuisance, upon the complaint of a plaintiff who acquiesced in or encouraged such erection.

An injunction will not be granted to prevent an erection on the mere ground that it is a public nuisance, unless the evidence is quite clear that it will be more advantageous to the public that this be done. Nor on the ground that it is a purpresture merely, unless the interest of the people of the state in their collective capacity require it.

To sustain a bill on behalf of an individual, it is not enough that the erection is a public nuisance, or a purpresture merely; his right to file the bill depends upon the question, whether it is also injurious to him as an individual?

To warrant the granting of a preliminary injunction, the proof of injury ought to be very clear.

Where the right is doubtful, the court will not enjoin, unless it appear that the injury to the plaintiff will be irreparable. *Harrison and others v. Newton and others*, 347

LANDLORD AND TENANT.

The Common Law of England, on the subject of light and air, as an easement or incident to real estate, is not the law of this country. It was inapplicable to the condition of this country when this state was settled by the colonists; it was not brought hither with them, and formed no part of the law of the colony on the 19th of April, 1775. Where, therefore, an owner of two adjoining lots in the city of New-York, upon one of which was a building deriving its light and air over and through an open space in the rear of the other lot, into which the windows of the building opened and looked, leased the building and lot upon which it was erected for a term of years, with its appurtenances, without reserving to himself a right to build on such other lot, or stop, or darken the windows of the building leased, and afterwards

built a house, covering the whole open space of the other lot, darkening the windows and excluding the light and air from the building occupied by his tenants: Held, That the landlord might lawfully darken or stop the windows by any erection on the other lot, and such an act was not in derogation of his own grant, and he could not be restrained by injunction from so doing. *Myers v. Gummel*, 173

LEASE.

Where a lease is assigned, though there be no reversionary estate in the assignor, yet, when a right of re-entry is reserved, the assignor may re-enter for breaches of the conditions of the lease.

Forfeitures and re-entries for breach of condition are matters of *strictissimi juris*. Equity abhors and relieves against them.

Formerly equitable relief would not have been granted at the same time that a forfeiture was demanded, and the rule is not changed by the code.

The code has abolished the distinction between equitable and legal remedies; but it has not changed the inherent difference between legal and equitable relief. But inconsistent relief can no more be asked now than it could be under the old system.

The code has substituted for the writ of injunction the order of injunction; but the cases in which it may be granted remain the same as established by the Court of Chancery.

Accordingly held, where the plaintiffs, by their prayer for relief, demanded judgment of re-entry upon the demised premises for breaches of the conditions of the lease, and an injunction to restrain the defendants from further violation of such conditions, that the relief being inconsistent the plaintiffs have no right to it, and that the plaintiffs in this case have liberty to pursue either remedy at their option, but not both. *Hepburn and an'r agt. Linden and an'r*, 80

LIBEL.

An action of libel cannot be maintained upon an affidavit used to oppose a special motion, or in the regular course of any other judicial proceeding, if the affidavit so used was pertinent to the matter in issue.

A motion was made to strike out a part of a notice subjoined to the general issue, in an action of assumpsit, brought by an attorney for services. The part of the notice sought to be expunged, contained an allegation that the services for which the suit was brought were rendered in so careless, negligent, unskilful, undue and improper mode and manner, as to be abortive and valueless. The defendant's affidavit to oppose the motion, stated that the plaintiff had revealed confi-

dential communications made to him in his professional capacity in the transaction of a portion of the business for his services in which the suit was brought. Held, That the defendant's affidavit was pertinent to the issue on the motion, and therefore that an action of libel could not be maintained upon it.

The question, whether the affidavit was pertinent to the issue on the motion, is a question of law, and the demurrer to the declaration did not therefore admit the averment that it was impertinent. *Selden, appell. agt. Garr, resp.*, 137

Irrelevancy or surplusage is not a ground of demurrer to an answer which contains a denial of any material allegation in the complaint, or sets up a valid defence.

When a publication is libellous upon its face, the law implies that it was published with a malicious intent.

Malice in such cases is a conclusion of law which the plaintiff is not required to prove, nor the defendant permitted to deny.

It is only when the publication would be privileged, if not in fact malicious, that malice is necessary to be averred and proved.

In other cases, the denial of malice forms an issue, which a jury has no right to determine, and which the court must, therefore, reject as immaterial.

Allegations in a complaint, relative to the intent and motives of a libellous publication, are not to be deemed material, so as to render it necessary for the defendant to admit or controvert them in his answer.

Only those allegations in a complaint are material, in the sense of the code, which the plaintiff must prove upon the trial in order to maintain his action.

An innuendo is not an averment of facts, but an inference of reasoning.

When improperly framed, it may in some cases justify a demurrer, but its truth or falsehood is never a question of fact for the consideration of a jury.

The sole office of an innuendo, is explanation, and the only question which it raises is, whether the explanation given is a legitimate deduction from the premises stated, and this question it belongs to the court alone to determine.

The decision of the supreme court in *Van Vechten v. Hopkins*, settled the law in this state that "from the nature and use of an innuendo, it is not the subject of proof by witnesses."

Held that the issues taken in the answer of the defendant upon the truth of the innuendoes in the complaint were immaterial.

The code has made an important change in the rules of pleading in actions for libel or slander, in not requiring extrinsic facts, showing the application of the words to the plaintiff, to be stated in the complaint.

But extrinsic facts, when the proof is necessary to determine the meaning of the words, as libellous or slanderous, must still be stated in the complaint.

The code has only abolished those rules of pleading which are technical and formal, and arose chiefly from an arbitrary classification of actions.

These rules, which as founded in good sense and sound logic, lend an important aid in the investigation of truth, it has been careful to retain.

Of these rules none is more evidently just or better established than that which declares, "That where a defamatory charge is made in general terms, it can only be justified by a specification of the facts which are relied on to establish its truth."

An answer is insufficient in the sense of the code, and therefore bad upon demurrer, not only when it sets up a defence groundless in law, but when in the mode of stating a defence, otherwise valid, it violates the essential rules of pleading.

Held, that as the defamatory charges in each libel, set forth in the complaint, were general, the averments in the answer that the facts stated in each publication "were and are true," as a justification were insufficient.

An averment in an answer that certain facts are true, "as the defendant has been informed and believes," is to be construed as an averment "upon information and belief" of the existence of the facts, in all cases where the existence of the facts is necessary to be proved to constitute a defence.

Whether a publication, libellous on its face, may be excused as privileged, is a question of law that may be properly raised by a demurrer.

A publication cannot be excused as privileged upon the ground that its animadversions were a fair and legitimate criticism, unless the truth of the facts upon which these animadversions were founded is established or admitted.

In all such cases the defences of truth and privilege are inseparable; and when that of truth is not pleaded, that of privilege must of necessity be rejected.

Held, that as the publications set forth in the complaint were not justified, and asserted facts and imputed designs which rendered them libellous, the defence of privilege could not be sustained.

A demurrer may properly include matter in mitigation of damages, when the truth of a libel is not sufficiently pleaded.

It is not necessary that a demurrer should cover issues taken in an answer upon matters of inducement merely.

When circumstances in mitigation are meant to be given in evidence, they must be stated as such in the answer; otherwise, the plaintiff will have a right to infer that they are meant

to be relied on as a bar, and upon that ground may justly demur to them.

Held that plaintiff was entitled to judgment upon all the demurrers, with usual liberty to amend upon payment of costs given to defendant. *Fry v. Bennet*, 330

MARRIAGE ACT.

The 6th section of the revised statutes, volume 2, page 139, which declares: "If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority," is *retrospective* and applies to all marriages whether made before or after the passage of the act—and it was accordingly held that the children of such a marriage were entitled to legacies under the will of the testator, in the same manner as legitimate children, as the testator had died since the passage of the revised statutes, and no rights had vested in other persons.

Judges Bronson, Gardner, and Jewett dissented, holding that the statute was not retrospective, and that those children were not entitled to legacies. *Bowers, surviving executor of Marks, appell.*, against *Brower, guardian, &c., resp.* 196

MORTGAGE.

The equitable doctrine that when lands covered by a mortgage have been sold in separate parcels to different purchasers they are liable for the satisfaction of the debt in the inverse order of their alienation, must be considered as the settled law of the state.

Hence when the mortgagee with a knowledge of the facts releases lands primarily liable and of sufficient value to satisfy the debt, those previously conveyed are wholly discharged, nor is it necessary that the mortgagee should have actual knowledge of the equity of the prior purchaser. It is sufficient that the facts known to him made it his duty to enquire.

But the recording of the deed by the prior purchaser is not constructive notice.

Nor is the knowledge of an agent, unless he was bound to communicate the facts during the continuance of his agency.

Whether the possession of the purchaser is constructive notice—*Quere?*

But a recital description in a deed, the contents of which the mortgagee was bound to know, is sufficient to charge him with notice.

Held upon this ground that Plaintiffs had notice of the equity of Defendants, and Bill

accordingly dismissed with costs. *The Howard Insurance Co. v. Griffin and oth's*, 210

MULTIFARIOUS BILL.

See FRAUD.

NE EXEAT.

The writ of *ne exeat* is not abolished by the code, as a provisional remedy. In all essential particulars in its nature and effect, and in the cases to which it is applicable, the *ne exeat* is unlike the arrest provided for in the code (§ 178). It not being otherwise provided for in the code, and not abolished by it in express terms, remains a provisional remedy, which cannot with propriety be denied to suitors when asked for in a proper case.

To authorise the issuing of a *ne exeat*, facts must be set out sufficiently, on which the court (or judge) can repose its belief. Mere fears and apprehensions of the party are insufficient.

Where the plaintiff expressed her fears that from circumstances which had come to her knowledge, the defendant would depart this state; that he would sell his property here and remove his means from this state, and would forcibly abduct her from this state and remove her to Pennsylvania in order to subject her to the jurisdiction of the courts of that state, where it was alleged the defendant had instituted proceedings for a divorce from the plaintiff, on the ground of adultery—held, that the mere fears expressed by the plaintiff in the absence of any reasons given, were insufficient to authorise the issuing of a *ne exeat*. *Forrest v. Forrest*, 89

PARTIES.

Where a legatee filed a bill in Chancery in behalf of himself and all other legatees who might elect to come in under the decree, against executors for the construction of the will of the testator, and payment of his legacy, and a decree was made in such suit declaring that the complainant therein, and certain other persons were entitled to legacies, and such other persons did not come in and make themselves parties to that suit, by petition or supplemental bill or on the appeal brought from that decree by the executors; but proceeded by petition before the Surrogate for the payment of their legacies. It was held that such decree in their favor was not *res adjudicata*, and that the executors might contest their right to such legacy. *Bowers, surviving Executor of Marks, appell.*, agt. *Brower, guardian, &c., resp.* 196

See FRAUD.

PARTNERSHIP.

An intent to hinder or delay creditors, if not fraudulent, is not sufficient to vitiate an assignment for their benefit. Were it otherwise, no assignment for the benefit of creditors would be valid, since the necessary effect of any such conveyance is to hinder or delay the creditors by placing the property of the debtor beyond the reach of legal process.

A discretionary power given to an assignee to sell upon credit, although it may operate to delay the creditors, is no evidence of an intent to defraud them.

On the contrary, in most cases, it is for the interest of the creditors that this discretion should be given to the assignee, and hence their assent to its grant will be implied.

For the same reason, where the power is not given in terms, the law will imply its existence.

The propriety of vesting this discretionary power in a trustee is constantly recognised in Courts of Equity.

That such is also the sense of the legislature is manifested by many provisions in the revised statutes.

The judgment of the Court of Appeals in *Barney v. Griffin*, (2 Comstock, 365), is not a decision that an authority to sell upon credit vitiates an assignment.

Where an assignment made by partners, of the partnership property, gives a preference to debts due from the partners individually, although it is void as against the creditors of the firm, it has not the effect of rendering the whole assignment void under the statute. It violates a rule of equity, not the prohibition of the statute.

When a provision is illegal, as contravening a statute, it renders the whole instrument void; when it is merely inconsistent with a general rule of law, the invalidity reaches no further than the provision itself.

A security taken from one partner, individually, does not extinguish a partnership debt unless it is clearly proved that it was accepted in satisfaction.

Even where the debt as due from the partners in a court of law would be held to be satisfied, it is still regarded in equity as a subsisting debt, if it is certain that the monies were received, and have not been re-paid by the firm.

Held, that the assignment by J. W. and R. Leavitt to D. Leavitt was not rendered void by the provisions authorising him to sell upon credit, and to apply the partnership assets to the payment of debts due to him from the partners individually.

Bill dismissed with costs. *Nicholson and others against Leavitt and others*. 106

There can be no such thing as the goodwill of a business to be taken in the settlement of

partnership accounts, and to be made a charge by one partner against another, unless connected with an actual interest in the place where the business has been carried on. *Van Dyke v. Jackson et al.* 188

PLEADING.

The rule of pleading is, that it is not all the circumstances which go to make up a party's case, and which, if proved, would establish it, which must be pleaded, but only the legal effect of those facts.

As, on a sale of goods to an agent of the defendant, it is proper to aver a sale directly to the defendant, and an averment of a sale to the agent is improper, and will be stricken out on motion.

The object of pleading is not to obtain from the opposite party an admission of facts averred in the pleading, but to form a single and material issue, which the parties refer to the court or jury to try. *Dallmer and another v. Gibson*. 77

Where an answer merely denies the facts set up in the complaint, and contains no statement of new matter, constituting a defence, the plaintiff is not bound to reply thereto.

The defendant cannot in such case move for judgment for want of a reply; but his remedy is to notice the cause for trial. *Brown and others v. Spear and another*, 97

PRACTICE.

A plaintiff was served with a summons on the 10th August, but no copy of the complaint was served nor filed until the 31st August, on which day the plaintiff entered up judgment, and filed the complaint, as part of the judgment roll, and issued execution. It appeared that the defendant on the 27th August, by his attorney, had demanded a copy of the complaint, but that none had been served.

On motion to set aside the plaintiff's proceedings, held, that where a plaintiff does not serve a complaint with a summons, he is bound to file the complaint within twenty days after service of the summons, and that the plaintiff's proceedings must be set aside for irregularity.

The defendant is not entitled to be served with a copy of the complaint unless he, in writing, has made a demand of a copy thereof within ten days after service of the summons. The word "hereafter" in § 130 of the code has reference to the service of the summons, and not to the filing of the complaint.

The 416th section of the code, which provides that an order may be obtained from a judge to compel the pleadings in an action to be filed, applies only to such papers as shall have been served. *Tooney v. Shields*. 66 Although § 172 of the code allows an amend-

ment of a pleading once, of course, and without costs, yet as to costs, it can apply only where the first pleading has been regular.

If the opposite party has prepared and served motion papers to set aside the first pleading for irregularity, which is cured by the amendment, the party amending must pay such costs, even if his amendment is in time under that section. *Williams* agt. *Wilkinson*, 186

On appeal from a judgment upon a report of a referee, the date of issue on the general term calendar, must be the day of filing the report. *Gould and others v. Chapin and others*, 187

Irrelevant and redundant matter struck out of an answer with costs, because it did not come within the principle of pleading laid down in *Williams v. Hayes* (5 How, 470.) *Stewart and others* agt. *Boulton and an'r*, 353

PROMISSORY NOTE.

The presumption of law that the holder of a promissory note is its owner, is not repelled by showing that it came into his hands after it was due.

Proof of a valuable consideration is only necessary to be made when a defence is set up, which, unless the plaintiff was a purchaser for value and without notice, would conclude him.

In all other cases a plaintiff who sues as an endorsee, and proves his title as such, is to be deemed the real party in interest under § 111 of the code. *Chalmers* ads. *James*, 219

Contract of endorsement. *Beals* agt. *Vinton Peck*, 226

RECEIVER.

Appointment of—denial, &c. *McCarthy v. Hancock*, 98

RECOGNIZANCE.

It is not necessary in a recognizance taken to answer a criminal charge, to state the facts which give the magistrate jurisdiction. The entering into the recognizance, being the voluntary act of the party, he admits the authority of the magistrate, and acknowledges the regularity of the proceedings in which it is taken.

A recognizance need not state the particular charge which the principal is bound to answer; and the fact that the condition is general, furnishes no just ground of complaint, as the parties entered into the recognizance voluntarily.

Where the condition of the recognizance is that the principal shall appear at the next court of the general sessions of the peace, and answer all such matters and things as shall be brought against him, and abide the

order of the court, and not depart the said court without leave, the condition is not answered by an appearance merely at the next term of the court after the recognizance is taken. The legal effect of such a recognizance is, that the principal shall appear at the next court of general sessions, and answer such charge as shall be brought against him, and be forthcoming before the court at all times until discharged.

The statute of 1844, which allows a judgment to be entered in the office of the clerk of the city and county of New-York, upon a recognizance given to answer a criminal charge, upon filing the recognizance, with a certified copy of the order of the court for forfeiting the same, is not in contravention of the provision of the constitution of 1821, which declared that the trial by jury, in all cases in which it had been theretofore used, should remain inviolate forever—the trial by jury not having been used in the case of a forfeited recognizance before the adoption of the constitution.

If a recognizance upon which such judgment is entered has been discharged, the parties may be relieved by motion in the Court of Common Pleas of the city and county of New-York. *Semble*, If that court could not give relief on motion, a court of equity would interfere in a proper case.

The act of 1844 did not change the character of the liability of a party to a recognizance entered into before its passage; it merely introduced a more summary remedy. *Gildersleeve and an'r v. The People*, 18

REFEREE.

The appointment of a referee must be made by the court (§ 270 and 273) although parties may agree upon a suitable person for a referee. The court must be satisfied that the selection made by the parties is a proper one. A referee who proceeds in a cause, by virtue of an appointment by stipulation of the respective parties, merely, acts without authority.

The facts upon which a plaintiff relies for judgment against infant defendants, must be established by legal proof, notwithstanding, the attorney for the guardian of the infant defendants may have consented in writing that such judgment be taken, upon the report of a referee.

The guardian's responsibility to the infants does not help the difficulty.

Consent to use as testimony what the law will not recognize as such, cannot avail, although it be incorporated in a report of a referee.

Where the court clearly discover that the interests of infants are committed to a guardian who is not likely to protect them, he should be removed, and a proper one appointed.

The service of a summons, to be used as evidence against defendants who have not appeared, is defective where the sheriff's certificate is produced which states "that he served on them a copy of a summons and complaint," without mentioning any cause in which it was served.

Such service is likewise defective, where an admission of service purporting to be signed by some of the party's defendants is produced without some evidence of their signatures being genuine, or were written to the admission with their assent. The court takes judicial notice of the signatures of its officers, but are not presumed to know the signature of a party defendant, who has not appeared.

The admission of service of summons by party's defendants residing out of the state, is ineffectual as the basis of any judicial proceeding *in personam* in this state. *Lichfield v. Burwell*, 182

The mode of reviewing reports of referees upon the whole issues, in causes referred before the Code, (the report made afterwards,) is by motion, at special term, to set aside the report agreeable to the requirements of the 44th Rule of 1847, and the former practice. *LaWall agt. Grigg*. 314

See PRACTICE.

RELATIONSHIP OF JUDGE TO PARTY.

Relationship to either party disqualifies a judge from sitting in any court. *Oakley v. Applewall*, 45

REMITTING CASE FROM U. S. DISTRICT COURT TO U. S. CIRCUIT COURT.

A case will not be remitted to the Circuit Court from the District Court, except when it shall appear that the questions of law are, in the judgment of the District Court, of so grave a character that it must judicially declare them both difficult and important. *The United States v. O'Sullivan and others*, 193

REMITTITUR.

After remittitur filed in the court below, a motion will not be entertained to restore the remittitur to the Court of Appeals, with a view to move the appellate court to amend upon the ground that the court above have erred, &c. *Selden v. Vermilyan and others*, 83

WILL.

Witness to signature of testator. See WITNESS. Where the testator by one clause of his will

gave to the children of his sister Catharine a legacy of five hundred dollars each, and by another clause of his will gave to each of his nephews and nieces five hundred dollars, excepting one of his grand-nephews, naming him, and by another clause of his will gave to the children of that grand-nephew, calling him a nephew, collectively five hundred dollars, and the testator left besides the children of his sister Catharine, two nephews and a niece. It was held that the descendants of his brothers and sisters in any degree whose parents were dead were each entitled to a legacy of five hundred dollars; but that those descendants whose parents were living were not entitled—and great-nephews and nieces, and a great-grand-niece of the testator were let in under the term nephews and nieces, their parents and grand-parents being dead. *Bowers, surviving executor of Marks, appell, v. Brower, guardian, &c., resp.* 196

WITNESS.

Where one of the witnesses to a will had no recollection of what had transpired at the execution of the will, except that he signed his name as a witness at the request of the testator; and the other witness testified that the testator had the paper lying before him, with the printed or written side next to the table, and a small portion of the face of the paper so turned down, that the witnesses did not see any signature, and only saw a blank piece of paper, on which they signed their names as witnesses, at the request of the testator, and who, at the time, declared the within to be his free will and deed. *Held*, that this was not a sufficient acknowledgment of the subscription of the testator.

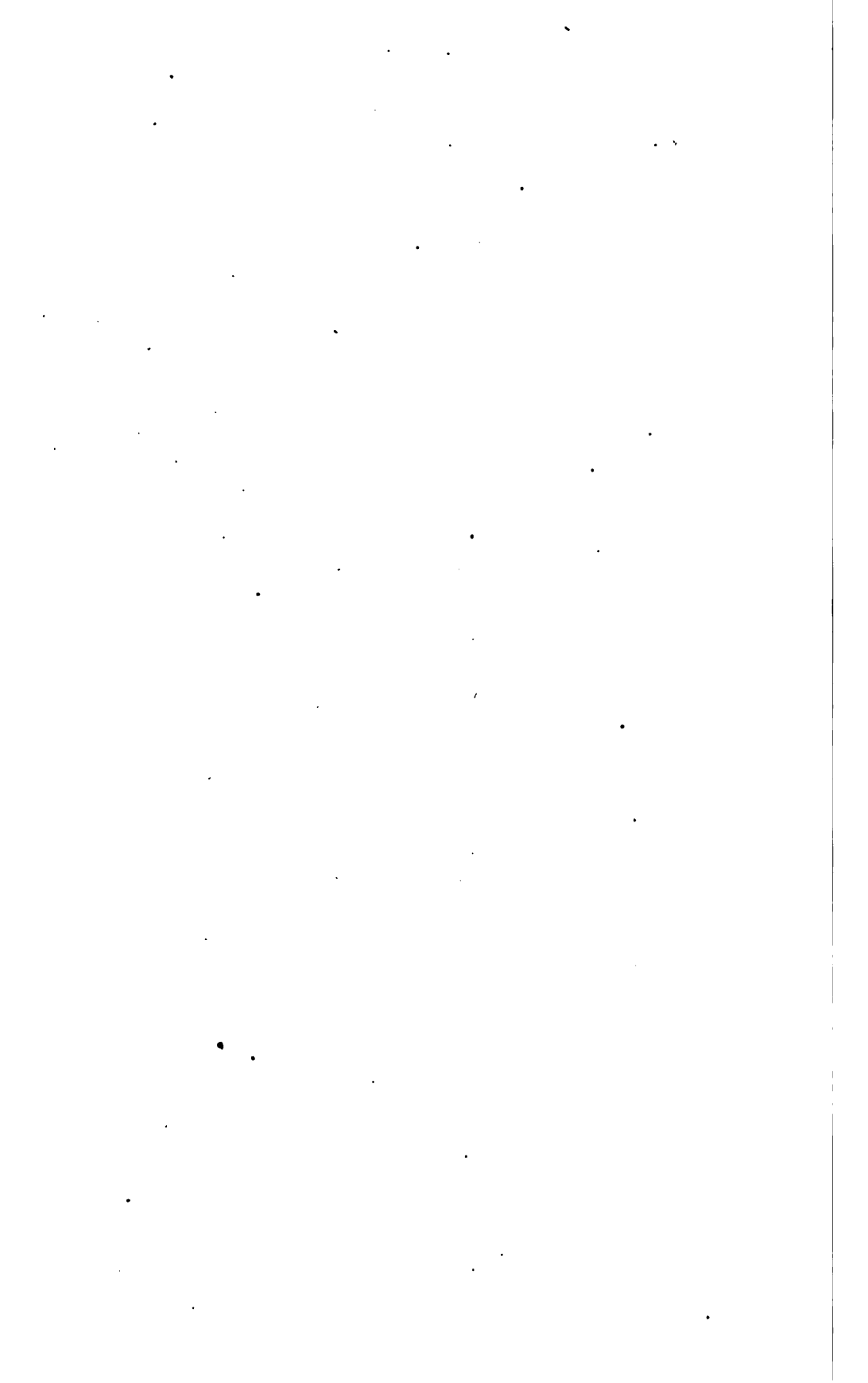
When a will is not subscribed in the presence of the witnesses, to prove the acknowledgment of the subscription to the attesting witnesses, there must be evidence sufficient to satisfy the court that the witnesses saw the subscription when the acknowledgment was made. *In the matter of proving will of Thomas Lewis deceased*. 150

The rule of the common laws which prohibits husbands and wives from being witnesses for or against each other, has not been repealed, or in any manner affected by the provisions of the code.

This rule is founded not upon the interest of the witness, but upon reasons of public policy.

Nor can the husband be a witness for or against his wife's trustee in any suit affecting her separate estate, even though she be not a party to the suit, and it makes no difference that the husband has no interest whatever in the result of the suit. *Hasbrouck, trustee &c., of Pickering v. Vandersoot and an'y.* 249





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